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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 859

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, American Trucking Associations, Inc., Twin Coast Newspapers, Inc., Aeronautical Radio, Inc., Air Transport Association of America, American Airlines, Inc., Eastern Airlines, Inc., and Lockheed Aircraft Corporation, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on September 15, 1966.

OPINIONS BELOW

The tentative decision of the Federal Communications Commission (J.A. 681-721)[1] is reported at 38 F.C.C. 370 (1964); the memorandum opinion and order of the Commission on final decision (J.A. 1116-31) is reported at 37 F.C.C. 1111 (1964); and the memorandum opinion and order of the Commission on reconsideration (J.A. 1173-87) is reported at 38 F.C.C. 761 (1965). The opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet officially reported, and appears in Appendix A.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was dated and entered on September 15, 1966. The jurisdiction of this Court is invoked under section 1254(1) of the Judicial Code, 28 U.S.C. § 1254(1), section 402(j) of the Communications Act of 1934, 47 U.S.C. § 402(j), and section 10 of the Judicial Review Act, 5 U.S.C. § 1040.

QUESTIONS PRESENTED

1. Whether, in order to determine the legal propriety of developmental volume communications rates such as those here involved, section 202(a) of the Communications Act, proscribing unjust discrimination, is completely self-sufficient, or whether it should be read together with section 201(b) permitting "commercial"

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[1] Citations to the joint appendix filed in the court below and with this Court are designated "J.A." Citations to other parts of the record certified by the Court of Appeals are designated "R." References to the unprinted transcript in the Commission's proceeding are designated "Tr." Other references to the unprinted record in the Commission's proceedings are designated "U.R." References to the appendix hereto are designated "App."

(a volume use classification) and other "reasonable" classifications, and in the light of the "public interest" developmental mandates of the Act.

2. Whether constitutional due process is denied when a Bureau of the Federal Communications Commission, which actively participated as a party in a vigorously contested rate case, is permitted through the same personnel to draft the agency's initial decision, and to advise and assist ex parte the agency members in reaching their decisions.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution of the United States, the Communications Act of 1934, as amended, and the Administrative Procedure Act are set forth in Appendix C hereto, pages 26a to 33a, *infra*.

STATEMENT OF THE CASE

A. On the Discrimination Question

TELPAK, the subject of these proceedings, is a tariff offering by the American Telephone and Telegraph Company (hereinafter "AT&T") of developmental volume communications rates to meet the large and growing requirements of government, commerce, and industry for large capacity communications facilities between specified points (J.A. 1188). In a rule making proceeding, *Allocations of Frequencies in the Bands Above 890 Mc*, 27 F.C.C. 359 (1959), 29 F.C.C. 825 (1960), the Federal Communications Commission (hereinafter "the Commission" or "the FCC") for the first time issued general authorization for private enterprises to construct their own microwave facilities, thereby permitting bulk communication users to

meet their requirements by private systems purchased at relatively low cost from non-carrier manufacturers (J.A. 126, 1341). In response to the needs of the national economy and the competition of private microwave systems, the TELPAK tariff was filed by the carrier on January 16, 1961 (J.A. 1308-28).

TELPAK provides communications paths of various widths (TELPAK channels) capable of transmitting various forms of electrical communication required by a modern business, such as telephone, teletypewriter, control, signalling, facsimile, and data. Four sizes of channels are offered, TELPAK A, B, C, and D, having carrier spectrum assignments of 48, 96, 240, and approximately 1,000 kilocycles per second, respectively. Monthly charges for the basic transmission path and for terminating the channels at the customers' premises vary with the size and length of the TELPAK channel and the type and number of circuit terminations provided. When TELPAK was first offered, AT&T estimated that its existing customers would be able to effect savings in charges ranging between $6 million and $12 million annually (J.A. 1188-89).[2]

After a controversy arose concerning the identity of the channels to be furnished, AT&T filed an amendment to the TELPAK tariff to clarify its intention to furnish at its discretion either single broadband "discrete" channels or various "diverse" channels to meet a customer's requirements (J.A. 1255-56). Following

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[2] By April 1, 1965, there were 1,190 interstate TELPAK customers using the equivalent of 18,000,000 voice channel miles, accounting for monthly revenues of approximately $8,800,000, or $105,600,000 per annum (AT&T Application for Interlocutory Injunction, July 1, 1965). The Commission has estimated savings of 51%, 64%, 77%, and 85% on TELPAK A, B, C, and D respectively (J.A. 694).

protests by Western Union Telegraph Company, AT&T's common carrier competitor (J.A. 1256-76), and Motorola, Inc., a private microwave equipment manufacturer (J.A. 1276-93), the Commission on September 8, 1961, suspended the tariff for the three-month statutory period and ordered an investigation upon four issues: (1) whether the charges were unjust and unreasonable under section 201(b) of the Communications Act;[3] (2) whether there would result any unjust or unreasonable discrimination or prejudice under section 202(a);[4] (3) whether TELPAK would have unlawful competitive effects upon other carriers or upon private manufacturers; and (4) whether the Commission should prescribe rates (J.A. 6-10).

During hearings before a hearing examiner extending over thirty-six days in 1961 and 1962, Motorola and Western Union intervened in opposition to the TELPAK rates. Numerous users of TELPAK serv-

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[3] "All charges, practices, classifications, and regulations for or in connection with such communication service shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications . . . ." 47 U.S.C. § 201(b).

[4] "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage." 47 U.S.C. § 202(a).

ice, including petitioners herein, intervened in support of the tariff, presenting extensive evidence concerning their dependence upon the TELPAK offering for the expansion of their communications facilities and the resultant beneficial effects upon the economics and efficiency of their operations and services to the public (J.A. 267-530).

The Commission issued its tentative decision on March 18, 1964 (J.A. 681-721), adopted the findings and conclusions therein by a memorandum opinion and order issued on December 23, 1964 (J.A. 1116-31), and affirmed on reconsideration on May 3, 1965 (J.A. 1173-87). No findings were made or conclusions reached on Issue "(1)" relating to the applicability of section 201(b) of the Act. On Issue "(2)" the Commission found TELPAK A and B to be discriminatory under section 202(a) of the Act, holding that TELPAK services are "like" private line services offered under another tariff at higher rates; that no material cost differences are attributable to TELPAK service as compared to private line services; that TELPAK A and B are not justified by competitive necessity; and that the record was inadequate to permit a determination whether TELPAK C and D are compensatory, although apparently justified by competitive necessity (J.A. 718). On Issue "(3)" the Commission declared it was unnecessary to determine whether TELPAK rates are lawful in relation to competition, but noted "in passing" that substantial revenues may have been diverted from Western Union and that the establishment of private microwave systems may have been effectively inhibited (J.A. 717-19). The Commission did not itself prescribe new rates under Issue "(4)," but ordered AT&T to "unify" TELPAK A and B

rates with private line rates, and to furnish a cost justification for TELPAK C and D (J.A. 1127).

B. On the Due Process Question

The Commission's order instituting the TELPAK investigation specified that the examiner to be designated to preside at the hearing would certify the record to the Commission for decision without preparing either an initial or recommended decision (J.A. 10). AT&T and intervenor Aeronautical Radio, Inc., requested modification of the order to provide for initial decision by a hearing examiner, and requested that the Commission's Common Carrier Bureau not be permitted to participate in the decisional stage of the proceeding (J.A. 11-18). These requests were opposed by intervenors Motorola (J.A. 36-41) and Western Union (J.A. 22-24), and by the Common Carrier Bureau (J.A. 24-35). The Commission by order issued February 12, 1962, denied the requests for modification, with Commissioner Ford dissenting (J.A. 51-56), and clearly indicated that it would rely upon the Common Carrier Bureau to draft the initial decision (J.A. 53).[5]

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[5] Since petitioners had argued that expedition did not require omission of a decision by the hearing examiner, and the Commission had failed to find facts as to the necessity for such omission as required by its rules, the Commission thereupon made such a finding in the conclusory language of the rule: "The essentiality of expedition to this proceeding is implicit in petitioners' arguments in their pleadings. That the Examiner's decision may be omitted under similar conditions likewise is clear. Accordingly, we find here upon the record that due and timely execution of our functions unavoidably and imperatively requires the certification of the record by the Hearing Examiner in this proceeding to us for Initial Decision without Initial or Recommended Decision by such Examiner." (J.A. 53.)

From the beginning of the hearing, the Common Carrier Bureau appeared as a party, through its counsel, William M. Lesher and Peter M. Andersen (J.A. 1337, Tr. 4-5, U.R. 547 (p. 6), 50-51). These counsel, together with other counsel from the Bureau who appeared later in the hearing, took an active part in the hearing, with extensive cross-examination of witnesses (see, *e.g.*, J.A. 1348-50, 1357-59, 1363-66, 1370-71, 1374-82, 1388, 1436-37, 1463-64, Tr. 1743-99, 2100-05, 2176-84), and objections to evidence (see, *e.g.*, J.A. 591-94, 4160-61, 1471, Tr. 2373-74).[6]

The presiding examiner, recognizing his figurehead capacity, repeatedly requested the advice of the Bureau counsel before making rulings upon the evidence, with the explicit recognition that Bureau counsel would be writing the tentative decision (see, *e.g.*, Tr. 1731-32, 1901, 1928, 1982-83, 1985, 1988, 1993, 2010-11, 2088, 2373-74).[7] Thus, at one point the examiner asked Bureau counsel whether he considered certain proffered evidence to be material, and stated: "After all, I recognize the fact, Mr. Lesher, that you are going to be responsible, I assume, for writing the initial decision in this case." (J.A. 1460.)

The tentative decision of the Commission was in fact prepared by the Bureau counsel, Mr. Lesher, Mr. Andersen, and persons working under their direction (see J.A. 53, 992-94, 1175, Tr. 1982-83, 2529, 2535). Bureau counsel also participated in closed conferences off-the-record with the Commissioners to discuss the tentative decision, the exceptions of other parties, and

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[6] Illustrative quotations from the unprinted transcript are reprinted in Appendix F.

[7] See *ibid.*

the final decision and order (see J.A. 53, 992-94, 1175). The Commission has admitted that under existing procedures "the Bureau conducts an investigation and participates in the hearing. . . . The Bureau also, however, has an active role in the decision of record rulemaking proceedings." *Rules Governing Ex Parte Communications in Hearing Proceedings,* 1 F.C.C. 2d 49, 52 (1965); see also *American Tel. & Tel. Co.,* 2 F.C.C. 2d 142 (1965), 2 F.C.C. 2d 877 (1966).

C. Proceedings Before the Court of Appeals

Eight petitions for review were filed before the United States Court of Appeals for the District of Columbia Circuit, Western Union alone intervening in opposition to the petitions. After an interlocutory injunction was granted on August 13, 1965, pending review, the Court of Appeals affirmed the orders of the Commission on September 15, 1966. Motions to stay the transmission of the court's opinion and certified copy of its judgment were denied by the Court of Appeals by order entered October 18, 1966.

REASONS FOR ALLOWANCE OF THE WRIT

The substantive and procedural anomalies of this rate increase case, some of which have been noted above, and others of which are hereinafter developed, are matched only by the importance of the case to the future of rate regulation of the communications industry and, indeed, possibly to the future of rate-making in general.

I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL STATUTORY LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. This Case Presents the First Judicial Review of Section 202(a) of the Communications Act of 1934, and Its Applicability to Competitive Rate-Making

For the first time in its history, judicial review is sought of section 202(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 202(a), which was invoked by the FCC, in an unduly narrow construction and out of statutory context, to condemn as "discriminatory" bulk package rate offerings by AT&T and the Bell system to users of their facilities having an expanding need for large volume communications services. AT&T itself recognized in its brief before the court below:

> This is a landmark case in the communications industry. Legal standards important to competitive rate making in the communications industry are before the courts for the first time in this case.

And indeed the court below manifestly recognized the importance of its decision in commending the full text of the three Commission opinions "to the attention of any other reviewing authority and of any student researching in this area" (App. 25a).

B. The Court of Appeals Has Too Narrowly Construed Section 202(a) Without Regard to Statutory Context

In upholding the Commission's action striking down developmental volume rates as discriminatory under section 202(a) of the Act, the Court of Appeals stated:

> The prohibition against different charges to different customers for like services under like cir-

> cumstances is flat and unqualified. The pertinent section of the statute bristles with "any". It is made unlawful for "any" carrier to make "any" unjust discrimination by "any" means, or to make "any" undue preference to "any" particular person, or to subject "any" person to "any" undue prejudice. [App. 17a.]

But section 202(a) of the Communications Act, like section 2 of the Interstate Commerce Act, 49 U.S.C. § 2, from which it was derived, does not prohibit every discrimination, but "only that discrimination which is unreasonable, undue, or unjust," *Nashville, C. & St. L. Ry.* v. *Tennessee,* 262 U.S. 318, 322 (1923).

"The money difference in price," declares the Court of Appeals, "is the core of the proscription" (App. 17a). But a money difference in price by definition is contemplated as valid and permissible in the express companion provision, section 201(b) of the Act, that "different charges may be made for the different classes of communications," 47 U.S.C. § 201(b). Thus, communications thereunder "may be classified into day, night [classification by time], repeated, unrepeated [classification by frequency], letter [classification by form], *commercial* [classification by volume user], press, Government [classification by character of the user] and such other classes as the Commission may decide to be just and reasonable" *(ibid.)* (emphasis added). TELPAK is merely a manifestation in the communications industry of common classifications by volume use and volume user—represented in the acceptation of classes such as "residential," "commercial," and "industrial" in gas, electric, and other utility tariffs. ***TELPAK is in effect a "large commercial" classification.***

Volume discounts find everyday acceptance in our economic system. "Quantity discounts are among the oldest, most widely employed and best known of discount practices. They are common in retail trade, wholesale trade, and manufacture-jobber relations. They are common in regulated as well as unregulated price structures." *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 745-46 (1947). "The commuter does not pay the same rate as the occasional traveler. The shipper by carload is not charged as the shipper of a single package. Telephone rates per message are lowered as the number of messages increases. Charges for water vary with the quantity consumed." *City of Rochester* v. *Rochester Gas & Electric Corp.*, 33 N.Y. 39, 48, 134 N.E. 828, 831 (1922) (Cardozo, J., for the court) (citations omitted).

The thrust of the Commission's decision is that volume rates are discriminatory, and therefore unlawful under section 202(a) of the Act, unless affirmatively justified by a difference in costs or competitive necessity. This gloss upon section 202 (a) is no part of the Act. Indeed, not one of the classes enumerated by illustration in section 201(b) as reasonable differentiations can be justified on a cost or competitive necessity basis, except perhaps to the limited extent it may be inferred that cost savings are inherent in volume uses or users—an inference which is necessarily fully as applicable and valid for TELPAK volume rates.

Section 201(b), however, was completely ignored by the Commission and the court below, despite the fact that the very *first* issue designated by the Commission in defining the scope of the hearing expressly called for determination of the applicability of section 201 (b) of the Act (J.A. 685). Nevertheless, through

three successive opinions of the Commission and the opinion of the Court of Appeals, not a single reference was made to the possible reasonableness of TELPAK rates as a class of rates under section 201(b), much less was any determination made of that issue.

The egregious effect of this narrow interpretation of section 202(a) out of statutory context is to impinge upon basic principles of communications rate-making by rejecting virtually every classification as discrimination, and virtually every discrimination as invidious and as unlawful, despite the express classification and price differentiation provisions of section 201(b).

C. The Court of Appeals' Interpretation is in Conflict With Decisions of This Court Interpreting Comparable Provisions of the Parent Interstate Commerce Act and Other Similar Acts

The prohibition of section 202(a) of the Communications Act against unjust or unreasonable discrimination was purposefully drawn by the Congress to conform with comparable provisions of section 2 of the Interstate Commerce Act, 49 U.S.C. § 2. S. REP. No. 781, 73rd Cong., 2d Sess. 4 (1934); H. R. REP. No. 1850, 73rd Cong., 2d Sess. 5 (1934). The action striking down TELPAK volume rates under section 202(a), however, violates the settled interpretation upholding the validity of comparable volume shipment rates under the parent Act:

> It is well settled that differences in the quantities shipped as a single shipment may afford a fair and reasonable basis for differences in transportation rates. In railroad transportation, these differences are currently recognized as between carload, less-than-carload, and any-quantity lots. In truck transportation, in addition to truckload and less-than-truckload rates there are so-called volume rates. In connection with the latter, there is no

requirement as to the loading in a single truck. [*Molasses from New Orleans, La., to Peoria and Pekin, Ill.*, 235 I.C.C. 485, 498-99 (1939).]

There is indeed a striking historical parallel in the shared use of TELPAK services by various members of the airline, trucking, and other industries with the traditional shared use of carload rates in railroading, *ICC* v. *Delaware, L. & W. R.R.*, 220 U.S. 235, 242-43 (1911).

The rate "spreads" between volume and non-volume rates, based upon a volume classification and not upon a demonstrated cost differential, have been the life blood of the forwarding business in the railroad industry, *ibid.*, as well as the airline industry, where "weight breaks" are a usual and normal practice, *Airfreight Rate Case, Minimum Rates for Airfreight Forwarders*, 26 C.A.B. 339, 341-42 (1958).

In principle, TELPAK rates are not unlike the commutation ticket rates long upheld, *ICC* v. *Baltimore & O. R.R.*, 145 U.S. 263, 277-78 (1892), in the railroad industry, whereby a payment is made at a discount for tickets whether or not all of the trips contracted for are taken. Nor are they unlike the "blocked space" tariffs in the airline industry, which permit shippers to reserve a particular amount or "block" of cargo space on a regular recurring basis at rates which are reduced, but must be paid whether or not all the space is used. *CAB Regulation No. PS-24, Policy Statements, Amendment No. 3 to Part 399 —Statements of General Policy on Blocked Space Service* (1964),[8] now codified as 14 C.F.R. § 399.37.

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[8] Affirmed on rehearing en banc *sub nom. American Airlines, Inc.* v. *CAB*, 359 F. 2d 624 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 843 (1966).

TELPAK A and B rates provide developmental volume charges for 12 and 24 voice grade communications channels equivalent to such "carload" and "weight break" quantity charges. To declare them invalid is in direct conflict with this Court's decisions accepting similar practices under the parent provisions of the Interstate Commerce Act and with the recognized comparable rate practices of the regulated airline industry.

D. In Striking Down Certain Rates as Discriminatory, Although Only in Theory, the Commission Creates a Greater Real Discrimination, to the Short Range Benefit Only of AT&T and a Less Efficient Competitor

TELPAK A and B rates for 12 and 24 voice channels have been declared unlawful upon findings of theoretical discrimination in the abstract by comparison with private line tariffs, not upon a showing of actual injury.[9] At the same time, the Commission has indicated that there exists apparent justification for

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[9] No party offered evidence of injury to non-volume users resulting from the TELPAK offering. One intervenor alone, United Press International, complained that an advantage accrued to its competitor because of the levels of the rates (J.A. 719). One user, however, "cannot be said to be injured by the fact that another is able in a particular instance" to receive a more favorable rate. *ICC* v. *Baltimore & O. R.R.*, 145 U.S. 263, 280-81 (1892). Nor can injury to non-users be inferred from a mere difference in rates: "That there are in existence commodity rates . . . on a level lower than the applicable rates . . . does not of itself show that this difference in rates results in any undue prejudice to complainant in the marketing of its products. To establish undue prejudice and preference, the evidence must be such as to make reasonably clear how and where an assailed disparity in the relative levels of rates operates to the advantage of parties or traffic alleged to be favored and to the detriment of other parties or traffic. They may not be assumed or left to inference. General declarations as to competition, unsupported by evidentiary facts, and a mere showing of disparity of rates do not warrant a finding of undue prejudice and preference." *Saalfield Publishing Co.* v. *Atchison T. & S.F. Ry.*, 274 I.C.C. 584, 588 (1949).

TELPAK C and D rates of 60 and 240 voice grade channels (J.A. 1125-26). The result is that the Commission, purportedly protecting smaller users unable to qualify for the smaller volume rates, has not ameliorated but heightened any real discrimination. Common carrier customers with inadequate requirements for TELPAK C and D rates now would be deprived of any opportunity to benefit from TELPAK A and B rates, unlike the larger users. In addition, users in localities with heavy traffic can continue to receive the benefits of TELPAK C and D rates, but users in smaller communities with more modest channel requirements are deprived of intermediate volume rates (see App. D, pp. 35a-40a).

This anomaly succeeds in bestowing a rate increase benefit (but only for the short run[10]) only upon AT&T and Western Union, its common carrier competitor and chief protagonist in these proceedings, although the Commission has specifically declined to assess TELPAK's lawfulness in relation to competition (J.A. 717-18). This Court has held, however, that the Commission may not serve as a "giant handicapper" to require rates to be raised to an artificially high level merely to protect a less efficient competitor. *ICC* v. *New York, N. H. & H. R.R.*, 372 U.S. 744, 757-58 (1963).

There is all the more reason why a common carrier should be permitted to establish developmental volume rates where, as here, they are designed to meet the competition of an unregulated competitor (in this case, Motorola) whose costs are undisclosed (J.A. 1448, 1453,

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[10] In the short run, present TELPAK users will of necessity continue to rely upon common carrier facilities. In the longer run, where practicable, present TELPAK users will acquire their own private microwave facilities in preference to higher cost private lines leased from common carriers.

1456) and whose prices are subject to change without notice or restriction. *Cf. Mississippi Valley Barge Line Co.* v. *United States,* 292 U.S. 282, 284 (1934); *Wine, Pacific Coast to the East,* 329 I.C.C. 167 (1966).

E. The Court of Appeals' Decision Would Impose a Severe Burden Upon Users of Bulk Communications, and Inhibit National Economic Growth Attributable to the Greater Reliance Upon Communications Services

In respects which are critical for rate regulation in the communications industry, both the Commission and the court below have misconceived the legal significance of developmental volume rates, in concluding that they can be justified only by demonstrable cost savings or precise competitive necessity (J.A. 1122-23; App. 19a). It is submitted that there is an even higher, over-riding consideration which is applicable across the board and which must ultimately govern—the public interest standard, equally controlling in all the regulated industries, *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 142-43 (1940), *cf. Baltimore & O. R.R.* v. *United States,* 345 U.S. 146, 150 (1953), and permeating the fabric of the Communications Act. "In viewing the public interest, the Commission's vision is not to be limited to the horizons of the private parties to the proceeding." *Michigan Consolidated Gas Co.* v. *FPC,* 283 F. 2d 204, 226 (D.C. Cir. 1960).

In the sterilizing application of section 202(a) to TELPAK rates, both the Commission and the Court of Appeals have also misconceived the factual significance of the case, in failing to recognize the public interest achievements of developmental volume communications rates in stimulating the broad surge in the use of communications services and facilities. It is no exaggeration, and the record fully demonstrates, that business and industrial enterprises throughout the country, large and small, have constructed vast, com-

plex, and in many cases nationwide communications networks around the TELPAK offerings, upon which they rely to meet their communications needs efficiently and effectively; that TELPAK A and B rates are an integral aspect of these networks, serving communities which could not otherwise be served and acting as building blocks in national communications systems for service to the public as well as for private business; that there has been a revolutionary increase in the reliance on communications systems which has lead to major and dramatic improvements on a nationwide basis in the efficiency and sophistication of communications facilities; and conversely, that the availability of such "rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges" (section 1 of the Communications Act, 47 U.S.C. § 151) represented in the TELPAK rates have contributed enormously to business and industry expansion in meeting public needs (J.A. 267-530).

The essence of the TELPAK rates in stimulating the explosion in the use of communications facilities for business and industrial needs has been precisely the developmental or promotional character of the charges, in contrast with the levels (prohibitive in large part) of private line charges.[11]

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[11] As one example, in the case of the airline industry, elimination of TELPAK A and B would increase the cost of equivalent facilities for TELPAK A by 82.7%, or an additional $502,224 per annum, and for TELPAK B by 101.8%, or an additional $547,176 per annum (R. 1627). Although there has been a notable improvement in airline operations, reservations and other services, organization, and structure attributable to improved communications facilities, the obvious reaction to an increase in charges of this magnitude would be a curtailment of services and a revision in operations in line with budgetary allocations (R. 1628).

In the case of the trucking industry, as another example, which ranks third among the largest TELPAK users (after the Govern-

Likewise incalculable is the stultifying effect of the greatly increased rates upon the requirements of other industries for voice, data processing, high speed facsimile, and other volume communications facilities.[12] In laying a deadening hand upon technological innovation through developmental volume communications rates, the Commission has effectively suspended and retarded the tangible contributions which can be made to meet public needs. Such technological efficiencies and managerial initiative constitute elements to be promoted under the national policy of the Communications Act, rather than to be stultified. *Cf. Grain in Multiple-Car Shipments—River Crossings to the South,* 318 I.C.C. 641, 690 (1963).

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ment and the airline industry), and is composed in the overwhelming majority of small companies, elimination of TELPAK A and B rates would approximately double the $1,825,000 per annum paid for TELPAK A and B facilities alone over 8,570 miles (R. 1644-45). In many cases these facilities would very likely be abandoned, utilization of TELPAK C and D facilities would be reduced as economically unfeasible, and there would be "an incalculable dislocation in a variety of shipper services now achieved by the use of TELPAK facilities including central dispatching and scheduling of over-the-road vehicles, quick and efficient transmission of freight bills from origin to destination and tracing of lost and delayed shipments" (R. 1645-47).

[12] The public interest aspect of the growing interdependence between computers and high speed facsimile facilities and communications facilities such as TELPAK was one of the matters of significance pointed out by the interventions of Xerox and IBM in the Commission proceeding (J.A. 733, 755-64). Belatedly, the Commission on November 9, 1966, embarked upon a public inquiry into the regulatory and policy questions which are being raised by the growing interdependence of computer services and technology, and communications facilities and services of common carriers (App. E, pp. 41a-42a).

II. THE COURT OF APPEALS ERRED IN FAILING TO RECOGNIZE THAT THE FEDERAL COMMUNICATIONS COMMISSION'S UNIQUE PROCEDURES ARE IN CONFLICT WITH DECISIONS OF THIS COURT APPLYING PRINCIPLES OF CONSTITUTIONAL DUE PROCESS.

The Court of Appeals disposed of the challenge to the FCC's procedures in two short sentences of its opinion:

> . . . Section 8(a) of the Administrative Procedure Act permits the agency itself to issue a tentative decision in place of an examiner's report. Examination of this record satisfies us that the Commission complied with all procedural requirements. [App. 23a.]

With all due respect, it is submitted that the Court of Appeals misconceived the constitutional due process error complained of by the petitioners. It was not the mere absence of an examiner's report. Instead, it was absence of a fair hearing by reason of:

(1) Absence of an examiner's report, without any factual findings to support the belated, purely conclusory finding on the necessity for by-passing such report (J.A. 10, 53);

(2) Participation of Bureau counsel, as an active advocate in the proceeding, lined up on issues of consequence with the only other opponents of TELPAK, namely, Motorola and Western Union (*e.g.*, J.A. 591-94, 1348-50, 1357-59, 1363-66, 1370-71, 1374-82, 1388, 1436-37, 1460-61, 1463-64, 1471, Tr. 1743-99, 2100-05, 2176-84, 2373-74, 2426);[18]

(3) Deferral of the examiner to Bureau counsel on all important rulings on evidence, in view of the pre-announced order of the Commission to

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[18] Illustrative quotations from the unprinted transcript are reprinted in Appendix F.

the effect that Bureau counsel would write the initial decision (*e.g.*, Tr. 1731-32, 1901, 1928, 1982-83, 1985, 1988, 1933, 2088, 2373-74);[14]

(4) Actual drafting of the initial decision by Bureau counsel (J.A. 53, 992-94, 1175, 1460);

(5) Absence of any briefing or oral argument on the merits by Bureau counsel which would have indicated the Bureau position and given the other parties the opportunity to rebut; and

(6) Participation of Bureau counsel in ex parte consultation with the Commission on its final decision (*e.g.*, J.A. 53, 992-94, 1175; *Rules Governing Ex Parte Communications in Hearing Proceedings,* 1 F.C.C. 2d 49 (1965); *American Tel. & Tel. Co.,* 2 F.C.C. 2d 142 (1965), 2 F.C.C. 2d 877 (1966)).

The Commission acknowledges that its unusual procedures are "consistently employed" and "have been used in several recent important Commission rate-making proceedings." *American Tel. & Tel. Co., supra* at 144. The Commission is even now employing these procedures in a rate proceeding (*ibid.*), in specific reliance upon *Wilson & Co.* v. *United States,* 335 F. 2d 788 (7th Cir. 1964), *cert. denied on this issue,* 380 U.S. 951 (1965), and this Court's denial of certiorari there, as support for the legality of its procedures. Unless stopped by this Court the Commission will continue to use these questionable procedures, and other administrative agencies will feel free to use similar procedures in rate-making and other "rule making" proceedings. If these procedures are basically and constitutionally unfair, as we submit they clearly are, important rate proceedings of even greater length

[14] See *ibid.*

and scope than here involved will be jeopardized in their entirety.

The Commission's procedures conflict with the principle that due process is denied when a participant in an administrative proceeding—whatever the interest represented by him—is permitted to intervene ex parte in the decision-making process. This is the clear holding of *Morgan* v. *United States,* 304 U.S. 1 (1938), which involved a rate-making proceeding before the Secretary of Agriculture. Counsel from the Department's Bureau of Animal Industry participated in the hearing, and then drafted findings for presentation to the Secretary and participated in several private conferences with the Secretary with respect to these findings. In this context, this Court said:

> The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings *of a quasi-judicial character* the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand "a fair and open hearing,"—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. [304 U.S. at 14-15. (Emphasis added.)]

In holding thereafter that the ex parte presentations by Bureau counsel to the Secretary without notice or opportunity to respond being granted to other participants violated due process, this Court stated:

> The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party

> and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command. [304 U.S. at 18-19.]

Other applications of this principle are found in, *e.g., Gonzales* v. *United States,* 348 U.S. 407 (1955);[15] *Willner* v. *Committee on Character,* 373 U.S. 96 (1963); *In re Murchison,* 349 U.S. 133 (1955); *Sangamon Valley Television Corp.* v. *United States,* 269 F. 2d 221 (D.C. Cir. 1959); *cf. Gonzales* v. *United States,* 364 U.S. 59, 66 (1960) (dissenting opinion); *Hannah* v. *Larche,* 363 U.S. 420 (1960).[16]

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[15] In holding there that fairness required that a selective service exemption applicant be allowed to inspect the recommendation of the Department of Justice, this Court stated: "The petitioner was entitled to know the thrust of the Department's recommendation so he could muster his facts and arguments to meet its contentions. . . . [T]he right to file a statement before the Appeal Board includes the right to file a meaningful statement, one based on all the facts in the file and made with awareness of the recommendations and arguments to be countered." 848 U.S. at 414-15.

[16] The decision below is also aberrational when measured against the general march toward fairness in administrative proceedings. See, *e.g., Amos Treat & Co.* v. *SEC,* 306 F. 2d 260, 266-67 (D.C. Cir. 1962); *Trans World Airlines, Inc.* v. *CAB,* 254 F. 2d 90, 91 (D.C. Cir. 1958); *Columbia Research Corp.* v. *Schaffer,* 256 F. 2d 677 (2d Cir. 1958); *Texaco, Inc.* v. *FTC,* 336 F. 2d 754 (D.C. Cir. 1964). As the court stated in the *Trans World Airlines* case: "The fundamental requirements of fairness in the performance of such [quasi-judicial] functions require at least that one who participates in a case on behalf of any party, whether actively or merely formally by being on pleadings or briefs, take no part in the decision of that case by any tribunal on which he may thereafter sit." 254 F. 2d at 91.

In the present case Bureau counsel who were advocates in the case[17] also participated ex parte in the decision-making process. The inherent vice in entrusting the initial selection of evidence and preparation of findings to an advocate is shown in the present case. The tentative decision (J.A. 681-721) drafted by the Common Carrier Bureau counsel (and which other parties did not see until its issuance by the Commission) accorded little or no weight to evidence presented by numerous users of the new communications services.[18] The tentative decision was clearly the critical document in this case. The Court of Appeals stated: "The findings and conclusions of the Tentative Decision were in major part affirmed [by the Commission] without extended discussion. Our review, therefore, is directed procedurally to the more comprehensive Tentative Decision of March 20, 1964." (App. 11a.)

The Commission claims that the interests of other parties are protected because if the staff commits error, it will show up in the tentative decision and

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[17] The facts in this case clearly belie the Commission's contention that the position of Bureau counsel in a rate proceeding is not "adversary." An argument in *Morgan* v. *United States*, 304 U.S. at 20, that the Bureau counsel's position there was not "adversary" was dismissed by this Court as one which "has regard to the mere form of the proceeding and ignores realities." See also *United States* v. *Abilene & So. Ry.*, 265 U.S. 274 (1924). The Administrative Conference Committee on Rulemaking noted that when an agency staff participates in rate cases, "it is inevitable that the staff to a degree will become merely another adversary party to the proceeding." S. Doc. No. 24, 88th Cong., 1st Sess. 85 (1963).

[18] Thus the General Services Administration, an agency of the United States, stated in its "Exceptions and Supporting Reasons" that the tentative decision failed "to consider or give weight to testimony and evidence presented by GSA and other customer intervenors" (J.A. 812-13), and that in many instances "the Tentative Decision completely ignores the arguments of GSA and other customer intervenors" (J.A. 815; see also J.A. 822, 824-25).

will be corrected on the basis of the exceptions filed by parties. But the same Bureau counsel who prepare the tentative decision also confer ex parte and advise the Commission with respect to the validity of the exceptions and the form of the final decision. It strains credulity to believe that these persons will not have protective instincts with respect to their tentative decision. Judge Friendly, speaking for a three-judge court, recently disposed of a claim much the same as that of the Commission by observing that "for commissioners, as for judges, freedom of decision is at least subconsciously constricted once a position has been publicly taken." *Davis & Randall, Inc.* v. *United States,* 219 F. Supp. 673, 679 (W.D. N.Y. 1963).

The FCC's order dispensing with a hearing examiner's report was also arbitrary under the Commission's own rules which then provided, in pertinent part, that the examiner designated for the proceeding "shall prepare an initial (or recommended) decision," except where "the Commission finds *upon the record* that due and timely execution of its functions imperatively and unavoidably requires that no recommended decision be issued by the presiding officer." 22 Fed. Reg. 10991-92 (1957). (Emphasis added.) No finding in this respect was made by the Commission at the time of its original order on September 8, 1961 (J.A. 6-10), and when this deficiency was pointed out, a perfunctory finding was made only in the exact conclusory language of the rule without any specific findings based upon facts particular to this case (J.A. 52-53).[19] An agency must comply with its published rules, *e.g., Vitarelli* v. *Seaton,* 359 U.S. 535 (1959), and a finding required

[19] The fact that Bureau counsel took 15 months to prepare the tentative decision certainly belies the Commission's conclusion that due and timely execution of its functions required dispensing with the hearing examiner's initial decision.

by statute or rule is insufficient if it merely recites the language of the statute or rule without finding facts or circumstances which support the ultimate finding. *American Airlines, Inc.* v. *CAB,* 235 F. 2d 845, 851 (D.C. Cir. 1956), *cert. denied,* 353 U.S. 905 (1957); *Pan American World Airways, Inc.* v. *CAB,* 261 F. 2d 754 (D.C. Cir. 1958), *cert. denied,* 359 U.S. 912 (1959).

A. The Commission's Purported Justification of Its Procedures as "Legislative" Action Is Insufficient.

The Communications Act empowers the Commission to determine and prescribe reasonable charges and fair practices, only "after full opportunity for hearing," 47 U.S.C. §§ 204, 205(a). The Commission, however, attempts to justify its distinct rate-making procedures with the out-dated argument that this is "legislative" action. But as this Court stated in *Hannah* v. *Larche,* 363 U.S. 420, 442 (1960), "when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." See also the following cases in which this Court rejected arguments that various procedures were not required because the proceedings were "legislative": *Southern Ry.* v. *Virginia,* 290 U.S. 190 (1933); *ICC* v. *Louisville & N. R.R.,* 227 U.S. 88 (1913); *cf. Opp Cotton Mills, Inc.* v. *Administrator,* 312 U.S. 126 (1941); *Gonzales* v. *United States,* 348 U.S. 407 (1955).

Speaking on the very question posed by the present kind of proceeding, this Court has stated:

> The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investi-

gation, requiring due process of law for its determination. [*Chicago, M. & St. P. Ry.* v. *Minnesota*, 134 U.S. 418, 458 (1890).]

B. The Commission's Procedures Cannot Be Justified by the Administrative Procedure Act

That the Commission's procedures in the present case are not specifically prohibited by the Administrative Procedure Act is no answer to the proposition that these procedures are basically unfair.[20] In fact, the House Committee report on the Act made it clear that in some rate cases, failure to maintain separation of functions would be unfair even though such failure might not violate the wording of the Act. After ex-

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[20] Section 5(c) of the Administrative Procedure Act (5 U.S.C. § 1004(c)), which contains its only "separation of functions" provision, applies only to "adjudication," not to "rule making," and "rule making" is defined to include "the approval or prescription for the future of rates" (5 U.S.C. § 1001(c)). In addition, section 5(c) is specifically inapplicable to initial licensing cases and "proceedings involving the validity or application of rates."

Although the Act was intended to further "fairness" in administrative procedure, it was admittedly a "beginning," not the last word. See H.R. REP. No. 1980, 79th Cong., 2d Sess. 48 (1946); 92 CONG. REC. 5646-63 (1946). Thus, the Senate Judiciary Committee urged that the exemptions of rule making and initial licensing cases from section 5(c) not be applied "where cases present sharply contested issues of fact" (S. REP. No. 752, 79th Cong., 1st Sess. 30 (1945)). See also 92 CONG. REC. 2159 (1946) (statement of Senator McCarran, sponsor of the bill).

In the 89th Congress just ended, the Senate Judiciary Committee stated: "Rulemaking, by its nature, is concerned with general policy matters rather than with specific and particular problems. It is legislative in character. *The application of a rule to a particular situation in the Committee's view is a matter for adjudication,* requiring evidence and proof different in nature from that justifying the formulation of the rule, itself." S. REP. No. 1234, 89th Cong., 2d Sess. 8 (1966). (Emphasis added.) (The full Senate concurred, for it passed the Bill (S. 1336) that would have made rate cases involving identified parties in specific situations subject to all adjudicatory procedures.)

plaining that initial license cases and "cases involving the validity or application of utility or carriers' rates" were exempted from the Act's separation of functions requirements, the Committee stated:

> There are, however, some instances of either kind of case which tend to be accusatory in form and involve sharply controverted factual issues, to which agencies should not apply the exceptions because *they are not to be interpreted as precluding fair procedure where it is required.* [H.R. REP. No. 1980, 79th Cong., 2d Sess. 30 (1946). (Emphasis added.)]

In accord with the intent of Congress, the courts have not hesitated to require stricter procedures than provided in the Administrative Procedure Act and similar statutes where needed for fairness. See, *e.g., Wong Yang Sung* v. *McGrath,* 339 U.S. 33 (1950); *Gonzales* v. *United States,* 348 U.S. 407 (1955); *Columbia Research Corp.* v. *Schaffer,* 256 F. 2d 677 (2d Cir. 1958); *Amos Treat & Co.* v. *SEC,* 306 F. 2d 260 (D.C. Cir. 1962); *Sangamon Valley Television Corp.* v. *United States,* 269 F. 2d 221 (D.C. Cir. 1959). In the *Sangamon Valley* case, the court rejected the FCC argument that ex parte communications were permissible because the proceeding was "rule making" rather than "adjudication." The court agreed instead with the Department of Justice, which stated in its brief:

> The need for fairness cannot turn on whether the label "quasi-legislative" or "quasi-judicial" be applied. The outcome of this proceeding, we emphasize, affected particular interests in a concrete, substantial way. . . . From this it seems clear that the Court's task of ensuring that an

> agency has acted "in accordance with the cherished judicial tradition embodying the basic concepts of fair play" (*Morgan* v. *United States,* 304 U.S. 1, 22) is not ended, or necessarily even aided, by attaching one or the other label to the agency proceeding under review. What is important is the substance of the proceeding and the nature of the interests involved. [Brief for the United States, p. 10.]

In short, the proscriptions of the Administrative Procedure Act[21] are not to be equated with due process. This is expressly recognized in section 12 of the Act, which declares that "nothing in this Act shall be held to diminish the constitutional rights of any person . . . ." 5 U.S.C. § 1011.[22]

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[21] Interestingly enough, the Commission relied upon the exemption of rate-making from the separation of functions provision (section 5(c)) but in doing so, it ignored not only the formal appearance of the Common Carrier Bureau as a party (J.A. 1337, Tr. 4-5, U.R. 547 (p. 6), 50-51), but also section 2(b) defining "person" as other than agencies, and "party" as "any person or agency named or admitted as a party" (5 U.S.C. § 1001(b)), as well as section 12 which expressly provides: "Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons." 5 U.S.C. § 1011.

[22] Section 409 of the Communications Act of 1934 (47 U.S.C. § 409, App. 29a), as amended in 1952 to tighten "separation of functions" provisions in FCC "*adjudication*" proceedings only (as defined in the Administrative Procedure Act), was not cited below by the Commission or the court, but was a secondary point of reliance by the Commission in *American Tel. & Tel. Co.*, 2 F.C.C.2d 142, 145 (1965). Such statutory provision cannot legalize any procedure of the Commission which constitutes denial of due process in a "sharply controverted" rate case. The constitutional guarantee of basic fairness is, of course, no more subject to repeal or amendment by the Communications Act than by the Administrative Procedure Act.

C. The Commission's Procedures Are Unique Among Federal Rate-Making Agencies, and Have Been Uniformly Criticized By Leading Authorities

It is significant that no other federal rate-making agency functions as does the FCC. Before the Civil Aeronautics Board and the Federal Power Commission, the presiding hearing examiner normally prepares the initial decision in formal rate cases. While the Interstate Commerce Commission normally omits the hearing examiner's initial decision in cases involving suspension of proposed rates changes, it does not do so in non-suspension rate cases where a hearing is held. Even in ICC suspension cases the presiding examiner prepares for the Commission a draft of a proposed decision. The staff counsel and other personnel of each of those agencies who participate in the hearing have no part in the preparation of the initial or final decisions, and are not permitted to consult ex parte with the examiner or the agency members.[23]

In recognition of the basic defects in the FCC's rate-making procedures, leading study groups and commentators have generally condemned them. The Federal Communications Bar Association and the American Bar Association's Administrative Law Section have filed presentations with the FCC criticizing as unfair the Common Carrier Bureau's participation

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[23] See STAFF STUDY, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, PROCEDURES FOR HANDLING RATE CASES IN THE CAB 11, 13-14, 34-38, 45, 51-52, 53-56, 57-58 (1962); STAFF STUDY, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, THE CONDUCT OF RATE PROCEEDINGS IN THE FPC 32-33, 49, 52, 56-63 (1962); STAFF STUDY, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, THE CONDUCT OF RATE PROCEEDINGS IN THE ICC 51-52, 65-66, 68-70 (1961).

in the decisional process in rate-making proceedings.[24] The Administrative Conference of the United States recommended that in administrative rate cases, "unless *special reasons in the particular case* require its omission, the presiding officer should prepare and publish a decision." The Conference went on to recommend that "the agency's staff . . . be required, as are other parties, to produce its evidence and state its position at an early point *and be treated in all other respects as a party.*" In particular, "off-the-record communications between the presiding examiner and members of the agency's staff who participate in the hearing *should be governed by the same principles made applicable to outside participants . . . .*" Recommendation No. 19, S. Doc. No. 24, 88th Cong., 1st Sess. 50, 51-52 (1963). (Emphasis added).[25]

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[24] See FCC Docket 15381: Comments of Federal Communications Bar Association, pp. 5-6, June 11, 1964; Comments of the Federal Communications Bar Association on Petition for Reconsideration, p. 2, Oct. 6, 1965; Comments of the American Bar Association Section on Administrative Law on Petition for Reconsideration, Mar. 18, 1966. See also 2 DAVIS, ADMINISTRATIVE LAW TREATISE § 13.02 (Supp. 1965).

[25] The FCC has adverted to the Administrative Conference recommendation, but says that it has insufficient staff personnel to function otherwise than in its present manner. This plea of administrative economy is unavailing in light of the express rejection of the very same argument in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 46 (1950). See also *United States* v. *Abilene & So. Ry.*, 265 U.S. 274 (1924). Moreover, the FCC is not itself unanimous in approval of its procedures. Commissioner Loevinger vigorously opposes the path being followed by the Commission. See *American Tel. & Tel. Co.*, 2 F.C.C. 2d 142, 157 (1965), 2 F.C.C. 2d 877, 883 (1966) (dissenting opinions); *Rules Governing Ex Parte Communications in Hearing Proceedings*, 1 F.C.C. 2d 49, 62 (1965) (dissenting opinion).

The Conference's Committee on Rulemaking published a report in support of these recommendations in which it observed that "the basic principle of fairness which underlies separation-of-functions ideas is applicable to *ex parte* consultation with participants in rate proceedings," and stated:

> Discussions with staff members participating in the case as lawyers or witnesses should be kept on the same basis as with outside participants; that is, the discussion should be limited to procedural or other matters falling within the traditional *ex parte* area or all the parties should be notified or present.[26]

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[26] S. Doc. No. 24, 88th Cong., 1st Sess. 105 (1963). The Committee Report also stated: "The basic reasons which supported the emphasis in the Administrative Procedure Act on the role of the hearing examiner in agency decisions remain important today. *Procedures which allow staff members to* conduct *ex parte* investigations, *render tentative decisions,* and then advise the agency heads with respect to the final decision *would tend to be arbitrary in fact as well as appearance.* Use of the independent hearing examiner protects against one-sided, biased, or arbitrary staff determinations and eliminates the appearance or actuality of unfairness." *Id.* at 82. (Emphasis added.)

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

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December 13, 1966

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19427

AMERICAN TRUCKING ASSOCIATIONS, INC.,
BETHLEHEM STEEL CORPORATION, et al., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

INTERNATIONAL BUSINESS MACHINES CORPORATION,
WESTERN UNION TELEGRAPH COMPANY,
NEW YORK CENTRAL RAILROAD COMPANY,
DOW JONES & COMPANY, INC., INTERVENORS

No. 19464

TWIN COAST NEWSPAPERS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

WESTERN UNION TELEGRAPH COMPANY, INTERVENOR

No. 19465

THE ASSOCIATED PRESS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

WESTERN UNION TELEGRAPH COMPANY, INTERVENOR

No. 19466

AERONAUTICAL RADIO, INC., et al., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

WESTERN UNION TELEGRAPH COMPANY,
NEW YORK CENTRAL RAILROAD COMPANY, INTERVENORS

No. 19467

AMERICAN TELEPHONE AND TELEGRAPH CO., et al.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

WESTERN UNION TELEGRAPH COMPANY,
NEW YORK CENTRAL RAILROAD COMPANY,
DOW JONES & COMPANY, INC.,
INTERNATIONAL BUSINESS MACHINES CORPORATION,
INTERVENORS

No. 19472

LOCKHEED AIRCRAFT CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

WESTERN UNION TELEGRAPH COMPANY, INTERVENOR

No. 19475

XEROX CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

WESTERN UNION TELEGRAPH COMPANY, INTERVENOR

No. 19479

UNITED STATES OF AMERICA, ACTING THROUGH THE ADMINISTRATOR OF GENERAL SERVICES, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

WESTERN UNION TELEGRAPH COMPANY, INTERVENOR

On Petitions to Review Orders of the Federal Communications Commission

Decided September 15, 1966

Mr. Robert H. Young, with whom *Mr. Jeremiah Courtney* was on the brief for petitioners in No. 19427, argued on behalf of petitioners in No. 19427; petitioner in No. 19464, petitioner in No. 19465, petitioners in No. 19466, petitioner in No. 19472, and petitioner in No. 19475.

Mr. Howard J. Trienens, of the bar of the Supreme Court of Illinois, *pro hac vice,* by special leave of court, with whom *Messrs. J. Edward Day, Jules M. Perlberg,* and *Gary L. Cowan* were on the brief, for petitioner in No. 19467.

Mr. Thomas J. O'Reilly, Assistant General Counsel, General Services Administration, of the bar of the Supreme Court of Virginia, *pro hac vice,* by special leave of court, with whom *Mr. J. E. Moody,* General Counsel, General Services Administration, was on the brief, for petitioner in No. 19479. *Messrs. John T. Ketcham* and *Paul P. Fitzpatrick,* Attorneys, General Services Administration, also entered appearances for petitioner in No. 19479.

Mr. John H. Conlin, Associate General Counsel, Federal Communications Commission, with whom *Mr. Henry Geller,* General Counsel, and *Mr. Robert D. Hadl,* Counsel, Fed-

eral Communications Commission, were on the brief, for respondents. *Mrs. Lenore G. Ehrig,* Counsel, Federal Communications Commission, also entered an appearance for respondent Federal Communications Commission.

Mr. Jack Werner, with whom *Messrs. Melvin Richter* and *John H. Waters* were on the brief, for intervenor Western Union Telegraph Company.

Mr. Donald C. Beelar was on the brief for petitioners in Nos. 19464 and 19465. *Mr. James M. Johnstone* also entered an appearance for petitioners in Nos. 19464 and 19465.

Messrs. Donald C. Bellar, Paul A. Porter, John E. Stephen, and *Harold L. Russell* were on the brief for petitioners in No. 19466. *Mr. James M. Johnstone* also entered an appearance for petitioner in No. 19466.

Messrs. James A. McKenna, Jr., Joseph M. Kittner, and *Aaron I. Fleischman* were on the brief for petitioner in No. 19472.

Messrs. Paul A. Porter and *Reed Miller* were on the brief for petitioner in No. 19475.

Mr. Charles R. Richey was on the brief for intervenor New York Central Railroad Company in Nos. 19427, 19466 and 19467.

Messrs. Lloyd N. Cutler, Louis F. Oberdorfer, J. Rogers Wollenberg, and *David R. Anderson* were on the brief for intervenor International Business Machine Corporation in Nos. 19427 and 19467.

Mr. William J. LeBuhn entered an appearance for intervenor Dow Jones & Company, Inc., in Nos. 19427 and 19467.

Before BAZELON, *Chief Judge,* PRETTYMAN, *Senior Circuit Judge,* and WRIGHT, *Circuit Judge.*

PRETTYMAN, *Senior Circuit Judge:* These are petitions to review three orders of the Federal Communications Commission relating to rates of the American Telephone and Telegraph Company. The eight proceedings, separately filed, were consolidated for argument and decision. The three orders are a Tentative Decison, released March 20, 1964, a Memorandum Opinion and Order, released December 24, 1964, and a Memorandum Opinion and Order, released May 4, 1965. Petitioners and intervenors are communications common carriers, users and potential users of bulk communications service, and the Federal Government through its General Services Administration.

In January, 1961, the American Telephone and Telegraph Company filed with the Communications Commission a tariff in which it announced rates for a new service, called by it "Telpak". The new service was offered, said the Company, to meet the growing requirements of government and industry for large capacity communication facilities between specified points. The service would provide communications paths of various widths capable of transmitting various forms of electrical communication, such as telephone, teletypewriter, control, signalling, facsimile and data. Four sizes of channels were offered, one a carrier spectrum assignment of 48 kilocycles per second (called Telpak A), one of 96 kc (called B), one of 240 kc (called C), and the fourth approximately a thousand kilocycles per second (called Telpak D). Telpak A was stated to be equivalent in capacity to 12 voice circuits, "B" to 24 voice circuits, "C" to 60 such circuits, and "D" to 240. The Company said it would provide channelizing equipment to subdivide Telpak channels into channels of lesser width, which it called "derived" channels, or it would terminate [1] the entire channel for use as a broad-

[1] The word "terminate" refers to the end use to which the service is put. "Terminating equipment" is this equipment thus used; for example, a telephone, equipment suitable for telephotograph, and various types suitable for data communication.

band transmission medium. The rate structure was in two elements, (1) a flat monthly rate per mile for the basic transmission path and (2) monthly rates for terminating the channels at the customer's premises. In nontechnical language this latter meant a rental for the equipment by means of which the electric energy was to be put to use.

Almost immediately a controversy arose. In less than a month Motorola, Inc., a manufacturer of radio equipment, moved for suspension of the tariff and for an inquiry and hearing. And about a month thereafter the Western Union Telegraph Company filed a petition in which it alleged that the Telpak tariff was an offering of broadband electrical paths of specified bandwidths and that a diversity of routing of channel components to make up a Telpak channel was not permissible under it. It further alleged that the Telephone Company had offered to furnish total channel requirements and to apply Telpak tariff schedules to such total, despite the fact that the channels, being over a diversity of routes, could not, or would not, be combined into a single broadband electrical path. In effect, said Western Union, the Telpak tariff would be applied to existing channel facilities however dispersed. This, it further said, was improper application of the tariff.

At this point we interrupt the thread of our statement to note several underlying facts of importance to the controversy.

The A. T. & T. has had for some years a service known as "private lines". A customer can lease equipment and service which permit him to communicate between given points whenever and as much as he pleases without going through the usual call-and-hook-up process. This private line service includes not only telephones but all sorts of communication facilities, such as almost instant reproduction of documents and photographs at long distances. The

services include telephone, telegraph, telephoto, data transmission, remote metering, supervisory control, and miscellaneous signalling and multiple channel service. Tariffs providing the rates for these private lines have long been in effect.

Modern government and modern industry have begun to require mass communication. Modern science has kept pace with these requirements. Thus in a nation-wide business the management frequently does not wish to read over a telephone from a central office to one or several branch offices the details of a statistical report. Waste of time and very great possibility of error in transmission would be thus involved. Management wants to reproduce the report in San Francisco exactly as it exists in New York. Science has supplied the means for doing this. And similarly there is equipment and carrying ability for many sorts of data, voices, automatic typewriting, photographic reproduction, signalling devices, and what is called merely data transmission.

These various instrumentalities require transmission channels of different widths. Thus transmission of the human voice requires a channel of 4 kc width. The voice is not a monotone; it embodies a number of tones. Thus it cannot be transmitted by a single beam of one frequency. It requires a composite of frequencies, ranging in width four kilocycles per second; for example, from 16 kc to 19 kc or from 27 kc to 30 kc. The more complicated data transmission requires channels of the width of 1000 kc. As we have pointed out, A. T. & T. offers these services (all of them except for highly sophisticated data transmission) on a private line basis. Such service for voice transmission, *i.e.*, telephone service, is in high demand; for other more complicated transmission the demand is, of course, less or non-existent as of the present time.

Private line services may be wanted on a multiple basis. A large industrial concern or the Government may want

more than one private telephone line. It may want ten, twenty or fifty such lines. Prior to the events here under consideration these needs were met by A. T. & T. and charged for by application of its private line tariffs.

In 1960 the Communications Commission made available to private use the higher frequencies in the broadcast spectrum—890 and over.[2] This permitted industrial concerns to maintain their own electric communications systems by microwave. Transmission by broadcast waves was effective for all the purposes we have mentioned as desired by big business and government. Equipment for this purpose was on the market. Thus a threat appeared to the common carriers in the rapidly developing field of mass business. A. T. & T. saw the potential slipping from it, and this was the sperm in the conception of Telpak.

A wide disparity appears between the rates proposed for Telpak service and those in effect for the same quantity of power and equipment under the private lines services. This disparity is startling, as illustrated by the following monthly rates:

	Individual Private Lines[3]	Telpak
(A) 12 Voice Grade Channels	$ 3,780	$ 1,860
(B) 24 Voice Grade Channels	7,560	2,720
(C) 60 Voice Grade Channels	18,900	4,300
(D) 240 Voice Grade Channels	75,600	11,700

There are wide differences between the charges for other types of transmission equipment and capacity in the two services.

We return to the the thread of the case. The question at this stage (*i.e.*, upon the filing of the petition by Western

[2] Allocation of Microwave Frequencies Above 890 Mc, 27 F.C.C. 359 (1959), 29 F.C.C. 825 (1960).

[3] Equipped for voice only at 100 miles.

Union) was whether A. T. & T. was complying with the terms of the tariff as filed. A. T. & T. admitted it was doing as Western Union said it was; it claimed the tariff permitted it to do so. The Commission made plain that no question was then raised with respect to the furnishing of a single broadband channel, which the customer might use as a single channel or might subdivide into channels of lesser width. "The question," said the Commission, "is presented, however, by the practices, admitted to by A. T. & T., of applying Telpak rates in those cases where a customer is not provided a single broadband channel, but instead is furnished a number of channels of lesser bandwidth which are not derived from a single broadband channel, but are derived instead from a variety of convenient sources. Thus, for example, take the case of a customer who has a requirement for 12 telephone channels and therefore orders a Telpak A service. A. T. & T., at its discretion, may provide the service over a single broadband channel of 48 kc subdivided by appropriate channel terminal equipment into 12 telephone channels. The practice here in issue arises where A. T. & T. chooses to provide the service over diverse facilities or routes utilizing channels of lesser bandwidth which are not derived from a single broadband channel (*e.g.*, 2 channels furnished on voice frequency cable, 4 on a microwave system, 3 on coaxial cable, 2 on an N carrier system and 1 on open wire line)."

Over the opposition of A. T. & T. the Commission held that the Telpak rates were not applicable to service furnished in the manner described as being in issue. The Commission said: "A multiplicity of channels of lesser bandwidth, derived from different facilities and types of facility, many of which are over diverse physical routes, is not by any test a 'communication path', a 'Telpak channel' or a 'broadband transmission medium.'" The Commission then ruled that service thus furnished was

not distinguishable from that offered under other tariffs of the Company, referring to the private line tariffs.

Very cogently the Commission said that if the terms of the Telpak tariff were analyzed it would be readily apparent that the only thing which distinguished the derived channels referred to in that tariff from the channels furnished under the private line tariffs "is the provision that the individual channels involved will be derived from the use of terminal equipment applied to a discrete Telpak broadband channel." The Commission concluded: "In any case, our interpretation permits the Company to derive Telpak channels as they wish, provided they are Telpak channels as defined in the tariff."

A. T. & T. responded to this ruling by amending the Telpak tariff so as to include a provision that "A Telpak channel or derived channels may be furnished by such physical facility arrangements appropriate for the forms of communication specified as the Telephone Company may elect for efficient utilization of available physical facilities, whether or not in the form of a single carrier spectrum assignment and whether or not the entire Telpak channel or all derived channels are on the same physical facility."

Thus the issue was drawn. The Commission set for hearing the question whether the rates as thus provided were discriminatory and unlawful.

Meantime and thereafter a complex of proceedings developed. Motions were made, argued, and disposed of. Briefs were filed. Intervenors appeared. In all, from start to finish, over 750 items appear on the Certified Index of the administrative Transcript of Record. The record shows 26 orders entered in the case. On September 8, 1961, the Commission issued an order in which it instituted an investigation of the Telpak tariff, listed questions to be considered, set a hearing, and directed

that an examiner be designated who should certify the record to the Commission "without preparing either an Initial or Recommended Decision". Thirty-six days of hearings were conducted by the examiner, and proposed findings and conclusions, with supporting briefs, were filed with him. The entire record was certified to the Commission without initial or recommended decision. On March 20, 1964, the Commission issued a Tentative Decision and invited exceptions to it. On December 24, 1964, after oral argument before it *en banc,* the Commission issued a Memorandum Opinion and Order. It passed upon the questions presented. On May 4, 1965, in response to numerous pleadings filed subsequent to December, 1964, the Commission issued another Memorandum Opinion and Order. The findings and conclusions of the Tentative Decision were in major part affirmed without extended discussion. Our review, therefore, is directed procedurally to the more comprehensive Tentative Decision of March 20, 1964.

To place the problem in easier perspective we state first the conclusion last stated by the Commission in its orders. This was to remand Telpak C and D for further evidence and study. The Commission did not make final findings or reach final conclusions in respect to the two Telpak subdivisions which dealt with carrier bandwidths of 240 kc (Telpak C) and 1000 kc (Telpak D). It remanded those two parts of the Telpak tariff. It considered the parts of the tariff dealing with carrier wave bandwidths of 48 kc and 96 kc, that is, Telpak A and B.

The first phase of the problem with respect to these parts (A and B) is whether the services furnished under them are "like" services of the same quantity furnished under private line tariffs. Could a customer obtain communication service and facilities under Telpak (exclusive of broadband data channels) different in any material functional respect from those available under other tariffs

already on file? For example, if a customer orders Telpak A service for telephone, does he get service "like" that which he would get if he ordered service for 12 telephones under private line tariffs? In each case the Company supplies energizing electricity of the same sort and in the same quantity. In each case it supplies the "terminating" equipment, the same in each instance.

Telpak channels (other than broadband data channels) are not necessarily discrete channels of the specified width. The amendment to the tariff made this clear. The types of facilities available are described in the Telpak tariff in terms of, and by reference to, the private line tariffs. So on the face of the tariff there is no distinction. Nor does the concept of base capacity reflected in the several sections of the Telpak tariff (for example, 48 kc in Telpak A) establish any difference from private line service, since in a Telpak contract only the channels required by the customer are set aside for his use. The other channels embraced within his contract (for example, 12 voice channels in Telpak A) are simply not allocated.

The vice president of A. T. & T. directly in charge of planning Telpak was offered by the Company as a witness before the examiner. The first question asked him on direct examination, after the introductory formalities, was "What is Telpak service?" The first sentence of his answer was "Telpak is a form of private line service." An undetermined number of private line customers of the Company at the time of the introduction of Telpak were given the new rates with no change whatever in the facilities they were being furnished. So the Commission concluded that private line services and Telpak derived channels are "like" communication services.

The Commission noted the great differences between Telpak and private line rates, which we have described, and held that since the two services were "like" it was

incumbent upon the carrier (A. T. & T.) to justify the differences in the prices.

The Commission entered upon a consideration of justifications for differences in prices of utility services. One possible justification for such differences is a difference in cost to the carrier. A. T. & T., the Commission said, advanced reasons for cost differentials in respect to Telpak but made no cost study. The Commission described the complexity of administering the myriad of possible routings for pricing purposes under Telpak. It suggested the possibility of higher costs for Telpak and depicted at length what it conceived to be infirmities in the A. T. & T. arguments in respect to costs, absent a factual study. It found no material cost differences attributable to furnishing a given number of circuits to a single customer under Telpak rather than to several customers on a circuit by circuit basis.

The next justification to be discussed was deemed by the Commission to be the principal contention of A. T. & T. This is the necessity to meet competition. Translated for application to the interests of the customers, the point is that if business is obtained or retained lower unit costs are achieved and these benefit the other customers. The justification for the difference in prices rests upon this foundation of benefits to all customers. The competition sought to be met in this instance was the private microwave system. The Commission noted that only one major private microwave system of the type here involved was then actually in operation. But it went on to discuss a report A. T. & T. had obtained from a firm of private engineers as to the costs of private microwave relay systems and as to the magnitude of the bulk communications market. The Commission examined and discussed this report in great detail. It also examined a cost study presented by the Motorola Company.

The Commission found "major infirmities" in the private microwave cost study presented by A. T. & T. First

was the fragmentary factual information upon which it was built. Second, the systems selected for study were based on historical rather than current costs. Third, the record cast grave doubts upon the accounting methods employed. Furthermore the Commission pointed out that in comparing private microwave systems with common carrier systems other factors must be borne in mind. Chief among these is reliability, the availability of technicians and maintenance personnel and of alternate facilities. Another factor is the inability of microwave to interconnect with common carriers, and another is reluctance on the part of many companies to tie up the capital requisite for a private microwave system. The Commission prepared and included in its opinion a table showing a comparison of common carrier rates and private microwave costs. From these figures the Commission concluded that as to Telpak A there was no justification for lower rates to meet microwave competition and that as to Telpak B private line rates are reasonably competitive with microwave. So it found no justification for lower Telpak A or B rates on the ground of competitive necessity.

Upon consideration the Commission concluded that the Telpak C and D rates were justified by competition, and this conclusion necessitated a determination as to whether these rates were compensatory, that is, whether they would bear their own costs or would be a burden on other customers of the Company. Long discussions of a bulk communications market study, of A. T. & T.'s analyses of anticipated Telpak costs, and of the ratio of route to airline pricing miles were included in the opinion. We need not relate them in detail. Upon completion of these inquiries the Commission was unable to determine whether the C and D rates would sustain the burden of their own costs and thus supply a justification of the difference between those rates and the rates charged other customers. However, since the disposition of sections C and D of the Telpak tariff is not before us on this appeal, we need not consider this phase of the matter.

The Commission concluded with four summary paragraphs:

(a) Telpak and private line services are "like" services.

(b) No material cost differences are attributable to Telpak service as compared to private line services.

(c) Telpak A and B are not justified by competitive necessity.

(d) The Commission was unable to determine on this record that the rates for Telpak C and D are compensatory and therefore was unable to find that those two services would benefit other users of A. T. & T. services.

It is to be emphasized that in its opinion and decision the Commission did not treat simply of the sale of broadband channels. In fact on this record the Commission held that the Telpak tariff as originally presented did not permit the assembly of separate channels to make a total capacity equal to a Telpak channel and the sale of that "conglomeration" as a Telpak channel. That, said the Commission clearly and bluntly, is not a Telpak channel. The present controversy arose after A. T. & T. revised the tariff to make clear that it was intended to permit the sale of the designated capacity at the proposed low rates regardless of the manner of the assembly of the channel. The A. T. & T. presents as its chief argument for Telpak the competition of microwave. But microwave is a broadband enterprise. It would seem that effective competition against it could be forged by the use of broadband channels. If A. T. & T. were to restrict its Telpak tariff to application to broadband sales, the problems which the Commission now sees in the venture would disappear. What other difficulties would be faced in such a tariff we do not now know. But the initial ruling of the Commission on the tariff as originally filed reflects indices of its attitude. It seems to us that the Commission is correct in saying that in so far as Telpak A and

B embrace the furnishing of a given quantity of service by miscellaneous means of the Company's choosing, it is "like" the service furnished under a contract for the same quantity of service under private line tariffs.

The precise points of attack by the Company upon the ruling of the Commission are not set forth with precision in the brief. The "Questions Presented", the Index under the heading "Argument", the "Statement of Points", the "Summary of Argument", and the several headings in the course of the "Argument" are couched in different terms in that brief. However the text of the Argument and the presentations upon the oral hearing make clear the thrust of the contentions.

The Company makes five points. These, it says, are separate but are interrelated in the sense that each relates to a fundamental error. This error, it says, is that the Commission held unlawful, as discriminatory, rates (1) which are compensatory, (2) without which the Company would lose business, and (3) as to which no evidence of any injury to any communications user appears. The error results, says the Company, from the Commission's erroneous interpretation of Section 202(a) of the Federal Communications Act.

I

A. T. & T. says the Commission erroneously interprets Section 202(a) of the statute[4] as imposing an absolute obligation to prevent unlawful discriminations, regardless

[4] 48 STAT. 1070 (1934), as amended, 47 U.S.C. § 202(a), reading as follows: "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

of the needs of users or other policy considerations. It says the statute affords protection where a particular rate is offered only to a certain user, and then offers protection against personal discrimination. It says the statute parallels Sections 2 and 3(1) of the Interstate Commerce Act,[5] after which this statute was patterned.

The Company says Telpak does not discriminate against anyone, since it is available to all. It finds this principle announced by the Supreme Court in *Interstate Commerce Commission* v. *B. & O. Railroad*[6] and in *Eastern-Central Ass'n* v. *United States*.[7] It says these cases establish that volume rates are lawful so long as they are available to all users; only where rates are a mere facade for rates which favor a particular user or class of users are they unlawful. The Company also says the second clause of Section 202(a) permits the Commission to protect users where no personal discrimination is involved but this protection can be invoked only where some particular person has suffered injury.

These contentions of the Company are obviously erroneous, it seems to us. The prohibition against different charges to different customers for like services under like circumstances is flat and unqualified. The pertinent section of the statute bristles with "any". It is made unlawful for "any" carrier to make "any" unjust discrimination by "any" means, or to make "any" undue preference to "any" particular person, or to subject "any" person to "any" undue prejudice. Moreover it is quite clear that this is not a matter of chance statutory semantics. It is a matter of public interest and policy. The money difference in price is the core of the proscription. Equal prices for like services is in itself a matter of public interest.

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[5] 24 STAT. 379-380 (1887), as amended, 49 U.S.C. §§ 1, 3(1).

[6] 145 U.S. 263 (1892).

[7] 321 U.S. 194, 201-202 (1944).

The prohibitory phrases were not in contravention of or an exception to the opening policy declarations of the statute, but were pursuant to and in furtherance of those declarations. The Supreme Court has spoken many times on this subject.[8]

We do not find in the *B & O.* case, *supra,* the doctrine the A. T. & T. finds there; that is, the doctrine that volume discounts are permissible whenever offered to all people. That case was a party-ticket case, and the Court seems to have justified the result by a difference in costs. The matter was treated with full explanations in the *Eastern-Central* case, *supra.* There the problem concerned the interplay of rail and water freight rates. The Court described the long-standing policy of the Interstate Commerce Commission, which at first rejected wholesale rates and then broke that rigid restriction by justifying a difference in rates by a difference in costs. Then came different modes of carriage (water and motor) with different methods of operation and different measurements of costs. The Court said that application of the principle that a difference in costs is the sole justification for rate differentials is well enough within the railroad area or the motor area but that when the two forms of carriage compete it is appropriate to consider a carrier's need to meet other carriers' competition. The Court rejected the argument that in such a situation competitive necessity is the sole consideration. It likewise rejected the contrary argument, that costs exclusively control. Conceivably, said the Court, circumstances might make one or the other factor

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[8] New York, New Haven & Hartford R.R. v. Interstate Commerce Comm'n, 200 U.S. 361, 391 (1906); Union Pacific R.R. v. United States, 313 U.S. 450, 461-462 (1941); Interstate Commerce Comm'n v. Baltimore & Ohio R.R., 225 U.S. 326 (1912); United States v. Chicago Heights Trucking Co., 310 U.S. 344 (1940); Seaboard Air Line Ry. v. United States, 254 U.S. 57 (1920). See also Maiatico v. United States, 112 U.S. App. D.C. 295, 301, 302 F.2d 880, 886 (D.C. Cir. 1962).

predominant, and in such a situation the choice would be for the Commission to make. This is the case before us. Here the Commission made inquiry into comparative costs and then into the competitive necessities. It weighed both factors. The choice was for it to make. This is the teaching of the *Eastern-Central* case as we read it.

II

A. T. & T. says the Commission's finding of competitive necessity does not relate to the same package of services which the Commission found to be "like" private line service. The Commission, says the Company, failed to test the competitive necessity of Telpak A and B in the same terms in which it found Telpak services to be "like" the private lines. In considering the latter problem, the Commission, says the Company, held that a customer could obtain under private line tariffs any package of services in any combination desired and thus duplicate the services proffered under Telpak; whereas, when the Commission considered whether competitive necessity justified the difference in rates, its comparison was limited to telephone channels. No consideration was given, says the Company, to any comparison of private microwave costs with respect to teletypewriter, data transmission, or any other service available under Telpak.

To this contention the Commission makes a short answer, that in the hearing before it the Company's witness used only telephone channel rates in his comparisons and the Commission had merely followed his lead in the matter. Further, the Commission pointed to the affidavit in the record to the effect that in the air transport industry, next to the Government, the largest user of private line channels, 94.8 per cent, is in voice grade circuitry. The independent study submitted by the Company indicated that about half the estimated bulk communications market is in the 48 kc or 12 voice channel area.

In making this contention the Company fails to adhere to what the Commission actually did. The Telpak tariff offered four sizes of channels, referred to as classifications, and provided separate rates for the base capacities and for the terminal equipment in each classification. The Commission treated these classes (A, B, C and D) separately in this part of its study. It found private line rates lower than microwave costs for the number of channels available under A. It found in respect to B that private line rates fell between the microwave costs submitted by A. T. & T. and those submitted by Motorola. The Commission found a competitive necessity for C and D. So the latter fall outside the range of this argument of A. T. & T. The flexibility, the range of service, etc., here emphasized by the Company do not fall to any great extent within Telpak A and B. The argument, when translated into terms within the actions really taken by the Commission, is that, whereas in finding Telpak A and B "like" private lines the Commission considered the full service offered in those two classes, when it considered competitive necessity it made a comparison based upon telephone channels. But the fact is that A and B are in major part telephone services. These are not the great broadband channels which modern industry uses for data and facsimile transmission. We repeat here that the Company, not the Commission, included in the Telepak problem all these narrow band channel services which presently form the vast bulk of the Company's business. The Company, not the Commission, made the comparison with microwave include so great a factor of telephone service.

We think the Company's argument on this point untenable when addressed to the disposition of the tariffs proposed for Telpak A and B. We think the Commission did not act erroneously when in comparing Telpak A and B with private microwave service it used telephone service figures only. If the Company's contention were addressed

to the treatment of C and D, it would appear to have greater validity.

Moreover, in this same regard, we note that the private line rates for telephone services are known, whereas the rates for the anticipated broadband services are as yet in major part speculative. The Commission was not in error in using the known data.

III

A. T. & T. says the Commission erred in using an "average" microwave cost for its comparisons. Here again the Commission points to the position taken by the Company itself at the hearing before it. The Company's witness, a Mr. Magree, clearly gave average (or mean) figures, and another Company witness, Mr. Scanlon, testified that, so far as cost is concerned, "the common carrier offering must be designed to meet average conditions". Motorola computed average figures. The Company says it submitted its evidence in terms of a range of costs, not as an average. The use of a range, it says, reflects the wide range in quality and reliability of microwave systems in use. But it must be apparent that a utility cannot use a rate structure with levels so minute as to meet every gradation in competitors' prices. The law against discrimination among utility customers prevents that. As the witness Scanlon said, a common carrier must aim at an average. And the question arises as to whether a range of prices really reflects the market. What proportion of the market is of poor quality, and what of superior quality? And we are not shown that the microwave costs include installation, which must be an appreciable sum.

The Company says that by using average cost as a measure of competitive necessity, the Commission has effectively precluded common carriers from competition for the business of users whose needs would be met by a microwave system of less than average cost, which the

Company equates with less than average quality. The Company says it is inherent in the Commission's view that private microwave systems be sheltered from competition except in the case of the more reliable systems. Several responses to this position are readily apparent. In the first place, as the Commission emphasized, differences in costs do not depict the whole of the competition between the common carrier and the private system. The reliability of the former, the availability at all times of mechanical technicians with the carrier, the interchangeability on the carrier system, and the necessity for the tie-up of considerable investment and installation funds in a privately owned system are all factors in the competitive picture.

Moreover the argument overlooks the fact that the Commission has not fixed the levels of Telpak rates; it has merely said that those rates and the Company's private line rates must be reasonably similar. If the competition from inexpensive microwave equipment of poor quality is so great as to threaten the common carrier service, let it be met by competitive private line rates as well as by packaged Telpak rates. And still further it seems to us that in the growing industrial and government areas which necessitate bulk communication services, cheap service of poor quality would be its own worst enemy. We are not impressed with the argument that the Commission, in ascertaining the competitive features of the situation by looking to average prices and costs, interposed a protectorate over inexpensive microwave equipment of poor quality.

IV

A. T. & T. says the Commission erred in its treatment of the burden of proof. It says the Commission took the position that the burden shifted to it to prove "the precise extent" of the competition it faced. This, of course, would be difficult to do, since much evidence is in the hands of

the manufacturers of microwave equipment, who are the Company's competitors. The Company says the Commission erred in not compelling Motorola to come forward with evidence of "actual" prices.

The Commission, as we have indicated, first determined that Telpak A and B were "like" services to private line service. Thus A and B appeared to be unlawful. Then the Commission pointed to what it found to be the Company's contention in support of the difference in rates (*i.e.*, the necessity to meet competition) and held: "Therefore, at this juncture, the burden is on A. T. & T. to demonstrate convincingly that the other users of common carrier services will, in fact, benefit by virtue of the application of the Telpak tariff." This seems to us to be in accord with rulings usually applied when a party comes forward with an affirmative defense to a *prima facie* illegality. Moreover in the present case, as we have pointed out, the Commission had before it, and examined at great length, two studies of the cost of private microwave. One was prepared by private engineers and presented by A. T. & T., and the other was presented by Motorola. The decision did not turn upon the burden of proof. That burden was at most a matter of convenience and of procedural precedence. We find no error on the part of the Commission on this point.

V

A. T. & T. says the Commission erred in failing to require an examiner's report. But Section 8(a) of the Administrative Procedure Act[9] permits the agency itself to issue a tentative decision in place of an examiner's report. Examination of this record satisfies us that the Commission complied with all procedural requirements.

Petitioners here vehemently declare that the ruling of the Commission now before us would destroy a vast im-

[9] 60 STAT. 242 (1946), 5 U.S.C. § 1008(a).

provement in mass communication and thus would hinder the effective operation of the Government and a major betterment in the conduct of major industrial and business enterprises. Such results would of course be disastrous. They are to be avoided at all costs consistent with legality. But we find no such lethal implications in the ruling. The Commission has not forbidden Telpak. At the most it has told the Company to make its rates for the new service non-discriminatory with its existing services. In dealing with the variations in price permissible on account of volume, the Commission seems to have applied the well-established rules applicable to competitive pricing. We do not find the horrendous effects pictured by petitioners.

Several petitioners urge points not presented or not stressed by A. T. & T., or cast in a different form from the A. T. & T. presentation. Xerox Corporation says it has invented and put on the market a method for transmitting facsimile which it calls LDX and which, it says, "represents a major addition to man's abilities to communicate beyond the range of sight and hearing." It says that Telpak is the only private line tariff which provides the bandwidth required for LDX. It says, "This becomes clearly apparent from comparative cost computations." But, as we have emphasized, the Commission has not proscribed the Telpak tariffs or the sale of broadband channels. The Xerox argument does not fit the Telpak offering as the A. T. & T. presents it. Rather it rests upon the lesser cost of Telpak to the user.

International Business Machines Corporation says the Commission's order must be reversed because the Commission did not formulate fair and reasonable rates for Telpak. The Commission had power to do so, but in a case of this sort we find no error in the Commission's leaving to the proponent of rate tariff the initial responsibility of submitting a non-discriminatory schedule. The practice is a commonplace in utility regulation.

Petitioners in No. 19466 (Aeronautical Radio, Inc., et al.) also make the foregoing contention and in addition say the Commission and its examiner erred in rejecting certain expert economic testimony. But the examiner and also the Commission found the proffered testimony to be a compilation of economic generalities without any showing of a relationship between the testimony and the issues in the case. They therefore deemed it to be of no probative weight in this controversy. We find no error in the ruling.

The Twin Coast Newspapers, Inc., and The Associated Press say the Commission, outside its authority, attempts to control the Company in the use of its plant facilities. The subject of the Commission's order is the service rendered the customer; in other words is at the marketing end of the process of manufacture and sale. Of course regulation of the sale may have a concomitant effect upon the manufacture, but that incidental effect does not nullify the regulatory authority over the sale.

We are not unmindful of the doctrine which overlies the whole of the consideration of this case. It is the well-established proposition that the findings of an administrative agency within the boundaries of its statutory power, if supported by substantial evidence on the record as a whole, are not to be disturbed by a court. But at the same time we cannot neglect that other well-established rule that the conclusions of the agencies are subject to judicial review, and for that purpose the reviewing authorities must know the bases upon which the conclusions rest. So we have explored the premises for the Commission's findings and conclusions in the case at bar. We find no reason to disturb them.

We commend the full text of the three opinions under review in this proceeding to the attention of any other reviewing authority and of any student researching in this area.

Affirmed.

APPENDIX B

On Petitions to Review Orders of the Federal Communications Commission

Before: Bazelon, Chief Judge, Prettyman, Senior Circuit Judge, and Wright, Circuit Judge.

Judgment

These cases came on to be heard on the record from the Federal Communications Commission, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the orders of the Federal Communications Commission on review in these causes be, and they are hereby, affirmed.

Per Curiam

Dated: September 15, 1966.

APPENDIX C

Constitutional and Statutory Provisions Involved

Constitution of the United States, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Title I, Section 1 of the Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. § 151:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of

wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

Title II, Section 201(b) of the Communications Act of 1934, 48 Stat. 1070, as amended, 47 U.S.C. § 201(b):

All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided,* That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications . . . . The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

Title II, Section 202(a) of the Communications Act of 1934, 48 Stat. 1070, as amended, 47 U.S.C. § 202(a):

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

Title II, Section 204 of the Communications Act of 1934, 48 Stat. 1071, 47 U.S.C. § 204:

> Whenever there is filed with Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. . . .

Title II, Section 205(a) of the Communications Act of 1934, 48 Stat. 1072, 47 U.S.C. § 205(a):

> Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Title IV, Section 409 of the Communications Act of 1934, 48 Stat. 1096, as amended, 47 U.S.C. § 409:

(a) In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated by the Commission for hearing, the person or persons conducting the hearing shall prepare and file an initial, tentative, or recommended decision, except where such person or persons become unavailable to the Commission or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision.

(b) In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated by the Commission for hearing, any party to the proceedings shall be permitted to file exceptions and memoranda in support thereof to the initial, tentative, or recommended decision, which shall be passed upon by the Commission or by the authority within the Commission, if any, to whom the functions of passing upon the exceptions is delegated under section 155(d)(1) of this title: *Provided, however,* That such authority shall not be the same authority which made the decision to which the exception is taken.

(c)(1) In any case of adjudication (as defined in the Administrative Procedure Act) which has been designated by the Commission for a hearing, no person who has participated in the presentation or preparation for presentation of such case at the hearing or upon review shall (except to the extent required for the disposition of ex parte matters as authorized by law) directly or indirectly make any additional presentation respecting such case to the hearing officer or officers or to the Commission, or to any authority within the Commission to whom, in such case, review functions have been delegated by the Commission under section 155(d)(1) of this title, unless upon notice and opportunity for all parties to participate.

(2) The provision in subsection (c) of section 1004 of Title 5 which states that such subsection shall not apply in determining applications for initial licenses,

shall not be applicable hereafter in the case of applications for initial licenses before the Federal Communications Commission.

(d) To the extent that the foregoing provisions of this section and section 155(d) of this title are in conflict with the provisions of the Administrative Procedure Act, such provisions of this section and section 155(d) of this title shall be held to supersede and modify the provisions of that Act.

* * * *

Section 2 of the Administrative Procedure Act, 60 Stat. 237 (1946) 5 U.S.C. § 1001:

* * *

(b) PERSON AND PARTY.—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

(c) RULE AND RULE MAKING.—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) ORDER AND ADJUDICATION.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule-making but including licensing. "Adjudication" means agency process for the formulation of an order.

* * *

Section 5 of the Administrative Procedure Act, 60 Stat. 239 (1946), 5 U.S.C. § 1004:

> In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—
>
> * * *
>
> (c) SEPARATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

Section 8 of the Administrative Procedure Act, 60 Stat. 242 (1946), 5 U.S.C. § 1007:

> In cases in which a hearing is required to be conducted in conformity with section 7—
>
> (a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule-making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

* * *

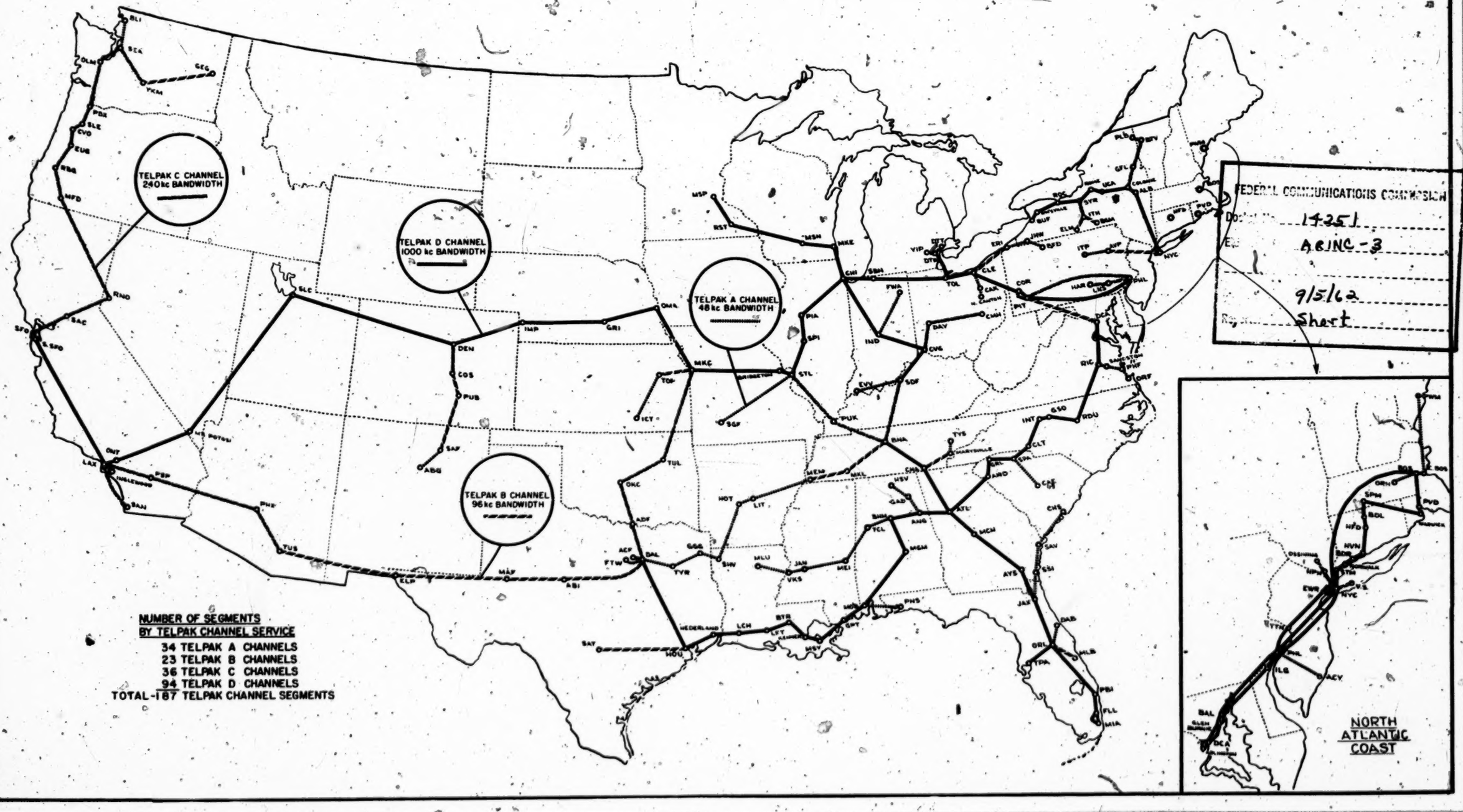
Section 12 of the Administrative Procedure Act, 60 Stat. 244 (1946), 5 U.S.C. § 1011:

> Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies

and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly.

TELPAK SERVICES IN USE OR ON ORDER JULY-1962

AERONAUTICAL RADIO INC.
EXHIBIT NO. 3
FCC DOCKET NO. 14251



NUMBER OF SEGMENTS
BY TELPAK CHANNEL SERVICE

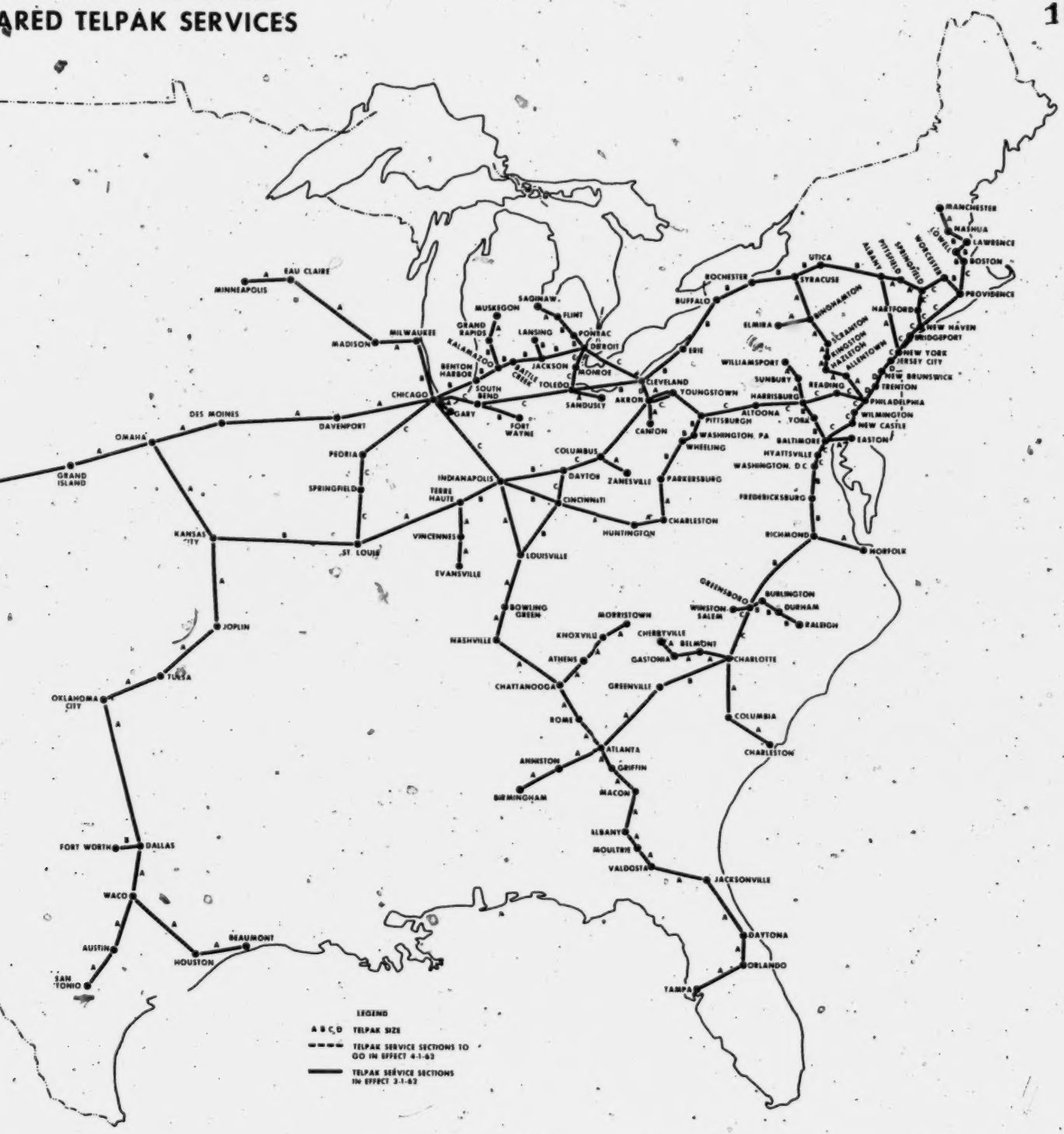
34 TELPAK A CHANNELS
23 TELPAK B CHANNELS
36 TELPAK C CHANNELS
94 TELPAK D CHANNELS
TOTAL-187 TELPAK CHANNEL SEGMENTS

FEDERAL COMMUNICATIONS COMMISSION
Docket 14251
Exhibit AERONC-3
Rec'd 9/5/62
Short

TRUC
SHARE
SEATTLE
TACOMA
PORTLAND
SALEM
EUGENE
ROSEBURG
MEDFORD
YREKA
MT SHASTA
REDDING
RED BLUFF
CHICO
YUBA CITY
SACRAMENTO
RENO
POCATELLO
OGDEN
SALT LAKE CITY
DENVER
OAKLAND
STOCKTON
REDWOOD CITY
PALO ALTO
MOUNTAIN VIEW
SAN JOSE
MODESTO
MERCED
FRESNO
BAKERSFIELD
LOS ANGELES
MONTEBELLO
ORANGE
OCEANSIDE
SAN DIEGO
EL CENTRO
YUMA
PHOENIX

RUCKING INDUSTRY
ARED TELPAK SERVICES

1891



[4469]

Charted on the map opposite this page are the cities in the United States where, through TELPAK, service to the public is made available for airline reservations and flight information.

The cities designated by triangles are served by TELPAK connections with consolidated reservations offices at cities designated by circles. Some cities designated as consolidated reservations office cities are also served, by some air carriers, by TELPAK connections with other consolidated reservations offices.

256 cities, with over 121,000,000 people, rely on TELPAK connections for airline reservations.

The map also shows where *Eastern*, a trunkline air carrier user of TELPAK, makes 1,071 TELPAK circuits available to the public and where *Mohawk*, a local service air carrier user of TELPAK, makes 221 circuits similarly available.

SERVICE TO PUBLIC THROUGH AIRLINES TELPAK

AIRLINES

TRUNK

LOCAL

— EASTERN

— MOHAWK

[4471]

Charted on the map opposite this page is the TELPAK circuitry made available to the public by the eleven trunk airlines, Pan American, Pacific Northern, and the thirteen local service airlines.

The 26 airlines whose reservations and flight information services are shown on the map are now carrying over 80,000,000 passengers annually.

Not shown are some 22 foreign flag airlines, freight forwarders, and other air carriers that also make extensive use of TELPAK in providing air transportation service.

SERVICE TO PUBLIC THROUGH AIRLINES TELPAK

4472

AIRLINES

— TRUNK

— LOCAL

— EASTERN

— MOHAWK

APPENDIX E

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

Docket No. 16979

In the Matter of

REGULATORY AND POLICY PROBLEMS PRESENTED BY THE INTERDEPENDENCE OF COMPUTER AND COMMUNICATION SERVICES AND FACILITIES

Notice of Inquiry

By the Commission: Commissioner Wadsworth absent.

I. Preliminary Statement

1. The modern-day electronic computer is capable of being programmed to furnish a wide variety of services, including the processing of all kinds of data and the gathering, storage, forwarding, and retrieval of information—technical, statistical, medical, cultural, among numerous other classes. With its huge capacity and versatility, the computer is capable of providing its services to a multiplicity of users at locations remote from the computer. Effective use of the computer is therefore becoming increasingly dependent upon communication common carrier facilities and services by which the computers and the user are given instantaneous access to each other.

2. It is the statutory purpose and responsibility of the Commission to properly regulate interstate and foreign commerce in communications so as to make available to all the people of the United States a rapid, efficient, nationwide and worldwide communications service with adequate facilities at reasonable charges (See Section 1 of the Communications Act of 1934, as amended). Thus, the Commission must keep fully informed of developments and improvements in, and applications of, the technology

of communications and of related fields. (See Section 218). Moreover, the growing convergence of computers and communications has given rise to a number of regulatory and policy questions within the purview of the Communications Act. These questions require timely and informed resolution by the Commission in order to facilitate the orderly development of the computer industry and promote the application of its technologies in such fashion as to serve the needs of the public effectively, efficiently and economically. To this end, the Commission is undertaking this inquiry as a means of obtaining information, views and recommendations from the computer industry, the common carriers, present and potential users, as well as members of the interested public. The Commission will then be in a position to evaluate the adequacy and efficacy of existing relevant policies and the need, if any, for revisions in such policies, including such legislative measures that may be required. It will also enable the Commission to ascertain whether the services and facilities offered by common carriers are compatible with the present and anticipated communications requirements of computer users. The Commission will then be in a position to determine what action, if any, may be required in order to insure that the tariff terms and conditions of such offerings are just and reasonable and otherwise lawful under the Communications Act. (See Section 201(b) and Section 202(a).)

• • •

APPENDIX F

Illustrative Excerpts From Unprinted Transcript

Tr. 1731-32

Presiding Examiner: Mr. Lesher, of what materiality would those bare-bone conclusions be in this record? *What kind of a finding would you put into the initial decision based on proof of that kind?* .[Emphasis added.]

Tr. 1901 (Cross-examination of AT&T witness by Mr. Wendt, counsel for Western Union.)

Mr. Wendt: For the purpose of application of the Telpak tariff. I think the witness and I understand one another perfectly.

The Chairman: Any problem with that, Mr. Lesher?

Mr. Lesher: No, sir.

The Presiding Examiner: It just seems to me to be calling for a series of legal conclusions.

Mr. Lesher: It seems to me that Mr. Wendt is asking in the context of how the company would apply its tariff regulations, which I think is proper for this witness. I might not agree with his conclusions, but I think he is proper, the proper man to be asked.

Tr. 1928

Mr. Conn [Counsel for Motorola]: . . . Didn't I understand Mr. Wendt to ask that the Examiner take official notice of the portions of the brief that he read?

Presiding Examiner: Mr. Conn, you know as well as I *the Examiner is not going to have anything to do with the decision in this case.* And I don't know, is it necessary, Mr. Lesher, to have official notice taken of that—

Mr. Lesher: I don't think it is necessary at that point. [Emphasis added.]

Tr. 1982-83

Mr. Lesher: Mr. Examiner, maybe I can take some of the worries out of Mr. Wendt's mind and Mr. Conn's mind

in saying that I agree with Mr. Conn's interpretation of the tariff. And maybe when the witness gets to New York he will give some consideration to clarifying the tariff.

The Witness: May I interrupt, Mr. Examiner, just briefly?

The Presiding Examiner: After all, the Examiner doesn't have to write the initial decision in this case, thank the Lord. And, since Mr. Lesher has now spoken up and apparently considers this line of inquiry to be material and significant, disagrees with the Examiner's ruling—

Mr. Lesher: I didn't mean that. I was trying to say we will take care of that later.

Presiding Examiner: Well, how will you take care of it later?

Mr. Lesher: By putting on my other hat and writing a letter to the company and say, "Your tariff is ambiguous. Clarify."

Tr. 2010-11 (Cross-examination of AT&T witness by Motorola counsel; AT&T counsel objected to line of questioning.)

Mr. Lesher: Mr. Examiner, since I cross-examined Mr. Scanlon on this same line, I am going to have to defend the materiality and relevancy of the line of questioning, and I do so.

Presiding Examiner: All right, the objection is overruled. I must say I am very puzzled by this, but I am overruling your objection.

Tr. 2088 (Offer by Motorola counsel of exhibit, to which AT&T counsel objected.)

Presiding Examiner: So what weight should be given to it really in the last analysis doesn't mean a thing. I don't know what weight should be given to it. Do you disagree with that statement, Mr. Lesher?

Mr. Lesher: No, I think you could do either one.

Presiding Examiner: In that case the objection is overruled, and Motorola Exhibit No. 8 is hereby received in evidence.

Tr. 2373-74 (Offer by AT&T counsel of exhibit.)

Presiding Examiner: Has the Bureau a position on this?

Mr. Lesher: Mr. Examiner, if what Mr. North is driving at is to refute the statement in that—the answer to the last question, number 45—I think that the study of private microwave costs, when put in juxtaposition with the tariff rates, will speak for itself, without the necessity of this graph—whether it be accurate or not. So I don't think it is necessary, frankly.

Presiding Examiner: Does the Bureau object to it?

Mr. Lesher: Therefore I would object to it on the grounds of materiality.

Presiding Examiner: Sustained.

Tr. 2411-13, J.A. 1460-61 (Request by Bureau counsel that evidence proposed to be offered by AT&T be excluded.)

Mr. Lesher: Perhaps, if I could get direct to the point why we do not believe that it would be helpful and has any decisional significance, the four customers we chose produced results. I will give you a concrete example of a return ranging from a negative five percent to a positive 78 percent. I believe that will explain one of the problems we had when we got the study, even though we had hoped that it would be helpful. To get right to the basic ground, we thoroughly have gone through the study and we find nothing in the study which we believe has any decisional significance or materiality.

Presiding Examiner: Are you prepared to state, Mr. Lesher, that the study does not in any way, shape, form or what have you, tend to confirm other evidence in the record provided by the telephone company?

Mr. Lesher: I will have to think about that one for a minute.

Presiding Examiner: Would you say that it tended to reenforce other evidence, Mr. Lesher—that it does have some value?

Mr. Lesher: I do not think, necessarily, Mr. Examiner, as a generality, because you can have too little evidence.

Presiding Examiner: The other evidence in the record contains a general study of the cost of TELPAK. If the study of the four specific customers tends in any way to reenforce what the telephone company has attempted to show as part of its direct case, are you prepared to state here and now that you would consider that to be immaterial and of no decisional significance? After all, *I recognize the fact, Mr. Lesher, that you are going to be responsible, I assume, for writing the initial decision in this case.* I do not think that you want to have the risk of going through a lengthy proceeding at this time only to have the case remanded at some later time because some evidence may have been excluded.

Mr. Lesher: I agree with that. I think that I can answer you this way: If I were writing a decision in the Telephone Company's favor I would, certainly, not rely on the four customer study. There is much better evidence in this record tending to show their position. [Emphasis added.]

(The Examiner asked Bureau counsel whether he would cross-examine on this exhibit if it were admitted, and Mr. Lesher answered in the affirmative (Tr. 2421). The following colloquy occurred (Tr. 2426):)

Presiding Examiner: How useful would it be, that is the question. I will ask Mr. Lesher. Mr. Lesher, what is the area of dispute between the parties on this four customer study? Is it that you want to use this as evidence, that you want to cross-examine on it in order to obtain precise information as to how it was compiled, or do you have some area of dispute that you want to cross-examine on?

Mr. Lesher: There are several areas which, I think, would be subject to cross-examination. I think there is, probably one area as to the validity of the figures themselves. Another would probably—I am now trying to anticipate some of the other intervenors besides myself—I am sure that the intervenors would take the Bureau's choice in the selection that was made.

Tr. 2529

Presiding Examiner: In terms of making findings, Mr. Andersen, in this case, after all, *you gentlemen are going to have to write this decision,* what is more meaningful, to have it by transmitters or to have it by station, and does it matter?

Mr. Andersen: Well, sir, I do not have any idea. That is why I was pursuing this line of questioning. [Emphasis added.]

Tr. 2535

Presiding Examiner: The Bureau is going to write the initial decision in this case, and since you are willing to make the information available to the Bureau, there is nothing the Examiner has to rule upon.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 859

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–25a) is not yet officially reported. The tentative decision of the Federal Communications Commission (J.A. 681–721) [1] is reported, *sub nom. TELPAK,* at 38 F.C.C. 370; its final decision (J.A. 1116–31) is reported at 37 F.C.C. 1111; and its memorandum opinion and order denying reconsideration (J.A. 1173–87) is reported at 38 F.C.C. 761.

[1] "J.A." refers to the printed joint appendix filed in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1966 (Pet. App. 26a), and the petition for a writ of certiorari was filed on December 13, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Federal Communications Commission found that certain rates under a tariff for "Telpak" private line communications service offered by American Telephone and Telegraph Company create an unreasonable discrimination and are accordingly unlawful under Section 202(a) of the Federal Communications Act of 1934. The questions presented are:

1. Whether the Commission's ruling has a rational basis and is supported by substantial evidence.

2. Whether the Commission's reliance in the decisional process upon assistance from its Common Carrier Bureau, which participated in the proceedings through counsel, was a denial of due process of law.

STATUTES INVOLVED

Section 202(a) of the Communications Act of 1934, 48 Stat. 1070, as amended (47 U.S.C. 202(a)), provides:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular per-

son, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

Other pertinent portions of the Communications Act of 1934 and pertinent portions of the Administrative Procedure Act, 60 Stat. 237 (5 U.S.C. 1001–1011), are set forth in the petition (Pet. App. 26a–33a).

STATEMENT

This case involves rates under a tariff of the American Telephone & Telegraph Company (AT&T), offering a private line communications service known as "Telpak," which the Federal Communications Commission found to be unlawfully discriminatory.

Wire and radio communications channels of a given band width may be divided by appropriate equipment into narrower channels to serve various communications needs—ranging from four kilocycles (kc) for voice grade transmission, to 1000 kc for certain forms of data transmission. Private line service[2] may be offered over such channels by communications carriers to both small and large users. In 1960 the Commission allocated certain frequencies for the use of private industry, thus making it possible for large users to establish their own communications system. Allegedly to meet this potential competition, AT&T filed its Telpak tariff on January 16, 1961 (J.A. 1187–

[2] Private line service consists of the leasing of communications channels for transmissions between specified locations without requiring the carriers to establish connections for each call or message. It includes telephone, telegraph, telephoto, data transmission, remote metering, miscellaneous signalling and multiple channel service.

1190; 1308–1328; see Pet. App. 8a). The tariff tendered the subscriber four categories of broadband Telpak channels. Telpak A offered the equivalent of 12 voice grade channels; Telpak B, 24; Telpak C, 60; Telpak D, 240.[3] In addition, AT&T offered to provide the equipment necessary to divide these channels into channels of lesser band width.

Shortly after this initial tariff had been filed, however, Western Union complained to the Commission that AT&T did not in fact propose to furnish a discrete[4] broadband channel which would be subdivided to the customer's specifications, as the tariff seemed to provide, but rather a group of conventional private line channels over diverse facilities at volume discounts ranging from approximately 50 percent (under Telpak A) to 85 percent (under Telpak D) (J.A. 1198–1212). After consideration of the complaint, the Commission agreed (J.A. 1225–1231; 1247–1254).

AT&T then amended its tariff to provide for the furnishing of Telpak "derived channels" by diverse facilities (J.A. 1253–1254). Motorola, Inc., an equipment manufacturer, and Western Union protested

[3] The tariff described the offering as (J.A. 1188):

"* * * communications paths of various widths (TELPAK (Channels) which are capable of transmitting various forms of electrical communication required by a modern business, such as telephone, teletypewriter, control, signalling, facsimile and data. The Telephone Company will provide channelizing equipment to sub-divide TELPAK channels into channels of lesser width (derived channels) or will terminate the entire TELPAK channel for use as a broadband transmission medium."

[4] Discrete channels are those provided in a single broadband on the same physical facilities. Diverse channels are those furnished over such physical facilities as the carrier elects.

that the revised tariff was discriminatory because it was nothing more than an offering of private lines on a volume discount basis without cost or other justification (J.A. 1256–1293). In September 1961 the Commission suspended the operation of the tariff [5] and ordered an investigation, in which its Common Carrier Bureau participated through counsel. An examiner took evidence in some 36 days of hearings and then certified the record to the full Commission without an initial or recommended decision.

In a tentative decision issued in March 1964 the Commission held that the rates for Telpak A and B were unlawfully discriminatory (J.A. 681–721). It found that:

> (a) Services furnished under the TELPAK tariff and those furnished under the various other private line tariffs are like communications services.
>
> (b) There are no material cost differences attributable to furnishing a number of channels to one customer under TELPAK as opposed to furnishing the same number of channels to several customers under the other private line tariffs.
>
> (c) There is no justification for TELPAK A and TELPAK B in terms of competitive necessity, inasmuch as the rates for the equivalent number of channels offered under ordinary private line tariffs are reasonably competitive with the costs of private microwave systems.
>
> (d) There is apparent justification for TELPAK C and D classifications in terms of meet-

[5] The amended tariff went into effect automatically upon the expiration of the three months' statutory period, subsequent to suspension, pursuant to 47 U.S.C. 204.

> ing competition from private microwave systems having channel capacities comparable to those offered by such TELPAK classifications. However, we are unable to determine on this record that the rates for TELPAK C and D classifications are compensatory in relation to the costs of furnishing the services offered thereunder and, therefore, are unable to find that the other users of A.T.&T. services will benefit and not be burdened by the application of such rates [J.A. 718].

The Commission noted that its decision did not foreclose carriers from establishing schedules of charges which would promote the use of volume communciations or stimulate the growth of the communications market generally, but indicated that whether the purpose was to meet competition or to attract new business, such schedules should benefit rather than burden other users of the carrier's services, and should not result in unjust or unreasonable discrimination (J.A. 718–719).

After taking exceptions and hearing oral argument *en banc,* the Commission in December 1964 issued a memorandum opinion and order substantially adopting the findings and conclusions of the tentative decision (J.A. 1116–1131). Petitions for reconsideration were thereafter denied (J.A. 1172–1187). In preparing its tentative and final decisions, the Commission utilized the services of staff members from the Common Carrier Bureau who had appeared as counsel of record in the proceedings.

AT&T and various customers of Telpak filed petitions for review in the court of appeals. On September 15, 1966, the court below entered its judgment

affirming the orders of the Commission (Pet. App. 1a–25a). After a detailed analysis of the pertinent statutory provisions and a thorough consideration of the record, the court below concluded that the decision was supported by substantial evidence and that no basis had been shown for disturbing it.[6]

ARGUMENT

1. Petitioners are customers of AT&T who are in a position to take advantage of the Telpak A and B volume discount rates.[7] But they do not challenge the Commission's findings that Telpak and other private line tariffs offer "like communications services";[8] that no material cost differences result from offering such services on a volume basis; and that Telpak A and B discounts are not justified by competitive necessity (J.A. 718). Rather, they urge that the Commis-

[6] While both AT&T and the United States (the largest Telpak customer), acting through the General Services Administration, challenged the Commission's orders in the court of appeals, neither party seeks further review in this Court. It is the position of the United States in this Court that, despite the potential financial effect of the Commission's determination on the government as the principal user of Telpak, the Commission's decision was properly upheld by the court below, and that no further review is warranted. Accordingly, the United States joins with the Commission in opposing certiorari.

[7] No question as to the legality of Telpak C and D rates was before the court of appeals (Pet. App. 14a). Most of the service used by the government is under Telpak C and D, not A and B.

[8] Whatever petitioners seek to gain from describing Telpak as "developmental" (*e.g.*, Pet. 2, 3) is substantially undermined by this unchallenged finding. In addition, the Commission concluded that Telpak A and B and private line services are furnished under substantially similar circumstances and conditions (J.A. 698, 717).

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sion has applied too narrow a standard in finding unreasonable discrimination under Section 202(a) of the Communications Act.

It is, however, well established under Section 2 of the Interstate Commerce Act (from which Section 202(a) was derived) [9] that the reasonableness of a discrimination is basically a factual question which has been committed by Congress to the expert judgment of the agency. See, *e.g., L. T. Barringer & Co.* v. *United States,* 319 U.S. 1, 6, 7. An administrative agency's conclusion on such a question will be disturbed only if it is not supported by substantial evidence, lacks a rational basis, or rests on an erroneous construction of the statute. After a comprehensive review of the record, the court below found that there was substantial evidence to support the Commission's ruling, that its decision had a rational basis, and that it properly applied the criteria of the Communications Act. There is thus no occasion for further review. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491.

Nor is there a basis for petitioner's contention, (Pet. 11–13), not presented below, that the Commission erred in failing to create a special "large commercial" user classification for them under Section 201(b) of the Act (47 U.S.C. 201(b)).[10] This section

[9] S. Rep. No. 781, 73rd Cong., 2d Sess., p. 304; H. Rep. No. 1850, 73rd Cong., 2d Sess., p. 5.

[10] In pertinent part, Section 201(b) provides:

"All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio sub-

empowers the Commission to make reasonable classifications of communication services, including a "commercial" classification. But there is nothing to indicate that the term "commercial" in Section 201(b) can properly be regarded as synonymous with the concept of "large volume users" of communication service. Petitioners actually seek a subclassification of the "commercial" classification, or the creation of a new classification (which the Commission in its discretion has authority to do under Section 201(b)), narrowly tailored to Telpak. That the Commission did not abuse its discretion in refusing to do so is plain, and does not warrant further comment. Moreover, in the Commission proceeding the primary question was whether Telpak could be justified as a distinct classification based on volume. In resolving that question, the Commission found Telpak A and B to be substantially the same as ordinary private line service and to be unjustifiable on the basis of cost or competitive necessity—the only justifications advanced by the parties before the Commission. Since the court below found substantial support for the Commission's resolution of these questions of fact and policy, no further consideration is necessary.

Contrary to petitioners' assertion (Pet. 15), the Communications Act does not require that the Commission find actual injury to other users of the service involved before it can conclude that a rate is un-

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ject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications * * *."

reasonably discriminatory. The purpose of Section 202(a) is to assure equality of treatment among users of like services. Only in special circumstances may a departure from this policy be justified. Thus, Section 202(a) does not require a finding of actual injury in the face of unequal treatment, but rather a showing by the proponent of a discriminatory rate that it is justified (see Pet. App. 22a–23a). Cf. *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344; *Eastern-Central Motor Carriers Ass'n* v. *United States*, 321 U.S. 194; *Interstate Commerce Commission* v. *Baltimore & O. R. Co.*, 145 U.S. 263, 281–282.

In reaching its result, the Commission followed the policy guidelines which Congress had laid down in Section 1 of the Act (47 U.S.C. 151). Its decision does not inhibit the expanded use of nationwide telecommunications systems, for Telpak encompasses no service that is not presently available either at reasonable rates under regular private line service tariffs, or through privately owned microwave systems. Even if the question of communications policy involved in this case were open to judicial consideration, the Commission's ruling is sound. It encourages competition in telecommunications, protects non-Telpak customers from carrying an unreasonable burden, and encourages further development of private line service—both by communications carriers and by industry-owned systems.[11]

[11] The Commission found a substantial diversion of revenue from Western Union, and that Telpak "may well have effectively inhibited the establishment of private microwave systems" (J.A. 718).

No showing was made to the Commission that AT&T's discriminatory rates for Telpak A and B could be cost-justified (see Pet. App. 13a).[12] Indeed, since the additional equipment required for Telpak is included in AT&T's rate base, costs not recovered by its volume discount rates must be borne by AT&T's customers paying for other classes of service. Thus, on this record, petitioners would benefit from favorable rates and AT&T would enjoy an expanded rate base, while non-Telpak customers would subsidize a service which was of no benefit to them—and have in fact done so during the period when the tariff was in effect. Moreover, to the extent that Telpak rates are below actual costs (including return on investment), favorable rates to Telpak users may cause a misallocation of resources by encouraging them to

[12] On September 1, 1965, AT&T presented the results of its cost study in another investigation then underway before the Commission. The AT&T study concluded that the ratio of net operating earnings to net investment (rate of return) for Telpak was three-tenths of one percent. Although the Commission found it unnecessary in the present proceeding to determine whether Telpak rates covered full costs, AT&T's own study indicates quite clearly that they do not. On the basis of the data contained in this cost study, which showed wide variations in earnings levels for different classes of service, the Commission initiated a full-scale investigation into the lawfulness of AT&T's "rate levels and rate relationships within that structure" (*In re American Telephone & Telegraph Co.*, 2 F.C.C. 2d 871, 871–872), excepting, however, Telpak service, "as to which separate proceedings are now pending * * *" (*id.* at 874). After the court below denied petitioners' motion to stay its judgment, the Commission redirected AT&T to eliminate the unlawful discrimination between Telpak A and B and private line rates. It also ordered Telpak C and D placed in the full-scale investigation presently in progress. On January 9, 1967, AT&T filed a new unified Telpak A and B and private line tariff to become effective on May 1, 1967.

use Telpak instead of lower cost systems. If Telpak cannot compete at non-discriminatory prices with private microwave systems, then the latter, as the lower cost service, should be allowed to replace it.

That the Commission may permit volume discounts justified by competitive necessity for Telpak C and D (J.A. 718) is not, as petitioners contend (Pet. 15–16), inconsistent with its invalidation of the Telpak A and B rates. The Commission has simply recognized that competitive necessity may, under appropriate circumstances, warrant resort to volume discount rates, provided the rates (1) "cover the costs attributable to the business retained or obtained" so as not to burden other rate-payers, and (2) make some contribution to the overall economy of the business (*i.e.*, by reducing fixed costs) (J.A. 1122–1123). As to Telpak A and B, however, competitive necessity was not adequately proved; as to Telpak C and D, whether the volume rates are properly compensatory was left undecided by the Commission, pending further hearings (see Pet. App. 14a).

Finally, petitioners err in contending that the only effect of the Commission's order will be to bestow a benefit on AT&T in the form of increased Telpak revenues. Such increases as are allowed will simply offset the costs borne by other regulated services provided by AT&T which would otherwise subsidize—and have heretofore subsidized—Telpak. Moreover, if petitioners believe that the increased rates are unreasonably high, they may apply to the Commission for appropriate relief, under 47 U.S.C. 204, 208.

2. Petitioners contend (Pet. 20–32) that participation in the decisional process by members of the Com-

mission's Common Carrier Bureau who also appeared as counsel of record in the hearings deprived them of a fair hearing in violation of the Due Process Clause of the Fifth Amendment. But in *Wilson & Co.* v. *United States*, 335 F. 2d 788 (C.A. 7), certiorari denied, 380 U.S. 951, which involved a general investigation of all private line tariffs, the Commission followed the same procedure, directed its Examiner not to prepare a decision, issued a tentative decision itself, received exceptions and then issued a final decision, all with the participation of the Common Carrier Bureau. The procedure was held to be consistent with the Administrative Procedure Act, the hearing provisions of the Communications Act (47 U.S.C. 205(a), 409(c)), the Commission's own rules and due process of law. There are no decisions to the contrary.[13]

Petitioners recognize (Pet. 29) that Section 5(c) of the Administrative Procedure Act does not require staff separation of functions in "proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers * * *" (5 U.S.C. 1004(c)), and that "rule making" is defined in Section 2(c) to include "the approval or prescription for the future of rates" (5 U.S.C. 1001 (c)).[14] And

[13] While declining to review this holding, the Court granted certiorari to review other rulings of the Seventh Circuit relating to the same proceeding. See *United States* v. *Wilson & Co.*, 380 U.S. 950, remanded, 382 U.S. 454.

[14] This Court has consistently treated ratemaking as constituting rulemaking, rather than adjudication. See, *e.g.*, *United States* v. *Morgan*, 313 U.S. 409; *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370; *Baer Bros. Mercantile Co.* v. *Denver & Rio Grande R. Co.*, 233 U.S. 479. In the Administrative Procedure Act and the Communications Act, Congress followed that basic dichotomy; the provisions of

their reliance on *Morgan* v. *United States*, 304 U.S. 1 (Pet. 22–23) is misplaced.

In *Morgan* the Court reversed a rate order of the Secretary of Agriculture because the interested parties were not given "a reasonable opportunity to know the claims of the opposing party [the Secretary] and to meet them" (304 U.S. at 18). The Secretary had never clarified his position during the hearings (*id.* at 19), and the first notice the parties received of his "concrete claims" was after the Secretary had finally "accept[ed] and ma[de] as his own the findings which ha[d] been prepared by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them" (*id.* at 22).

Morgan did not hold the preparation of a decision by counsel who had participated in the hearings was *per se* improper. In fact, following the remand the Secretary of Agriculture reissued his original final decision as an initial or tentative decision, giving the parties an opportunity to file exceptions and to present oral argument on the exceptions, a procedure approved by this Court in *United States* v. *Morgan*, 307 U.S. 183, 187, and again in *United States* v. *Morgan*,

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those Acts relating to staff separation of functions (5 U.S.C. 1004(c); 47 U.S.C. 409(c)) apply only to cases of adjudication. Adjudicatory cases are primarily "concerned with the determination of past and present rights and liabilities," and are thus "characterized by an accusatory flavor," while, on the other hand, rulemaking proceedings are "essentially legislative in nature." *Attorney General's Manual on the Administrative Procedure Act*, 14 (1947).

313 U.S. 409, 415–416 (after the taking of new evidence, since several years had passed since the Secretary's first decision).

In the present case, the Commission issued an elaborate tentative decision (J.A. 681–721).[15] Petitioners filed exceptions with supporting briefs and participated in oral argument before the Commission—all prior to the adoption of a final decision. They were thus afforded a fair opportunity to know and meet the Commission's contentions, which is all that the *Morgan* cases and the Due Process Clause require. See *Willapoint Oysters, Inc.* v. *Ewing,* 174 F. 2d 676, 692–94 (C.A. 9), certiorari denied, 338 U.S. 860.[16] Review by this Court is thus not warranted.

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[15] While petitioners claim that the omission of an initial decision by the examiner was arbitrary (Pet. 20, 25), they fail to recognize that Section 8(a) of the Administrative Procedure Act (5 U.S.C. 1007(a)) provides that: "* * * Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision *except that in rule making* or determining applications for initial licenses (1) *in lieu thereof the agency may issue a tentative decision* or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires" (emphasis added). While petitioners also assert that the Examiner deferred to Bureau counsel on all important rulings on evidence (Pet. 20–21), they point to no ruling which they specifically consider improper.

[16] While it might be deemed wise for Congress to subject ratemaking, at least under certain circumstances, to the separation of functions provisions of the Administrative Procedure Act (Pet. 30–32), this is clearly a matter of legislative judgment. Indeed, in the 89th Congress the Senate passed a bill which would provide for the separation of functions petitioners seek. S. 1336, 89th Cong., 2d Sess., §§ 2(c), (d); see S. Rep. No. 1234, 89th Cong., 2d Sess., p. 9.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 859

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT, THE WESTERN UNION TELEGRAPH COMPANY, IN OPPOSITION

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OPINIONS BELOW

The Tentative Decision of the Federal Communications Commission (J.A. 681-721)[1] is reported at 38 F.C.C. 370 (1964). The Commission's memorandum opinions and orders on final decision (J.A. 1116-31),

[1] Citations to the record herein will follow the pattern adopted by Petitioners. See Pet. p. 2, fn. 1.

and on reconsideration (J.A. 1173-87), are reported at 37 F.C.C. 1111 (1964) and 38 F.C.C. 761 (1965), respectively. The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 1a-25a) is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered September 15, 1966 (Pet. App. 26a). The petition for a writ of certiorari was filed on December 13, 1966. The jurisdiction of this Court is invoked, *inter alia*, under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the orders of the Federal Communications Commission setting aside as unlawfully discriminatory the rates charged by American Telephone and Telegraph Company and associated Bell System companies for so-called TELPAK A and B service rests upon a proper construction of Section 202(a) of the Federal Communications Act.

2. Whether petitioners were denied constitutional due process when, in accordance with long established practice approved both by Congress and the courts, the staff of the Commission's Common Carrier Bureau participated in the decisional process as well as in the hearings.

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934, as amended, 48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.* are set forth in Appendix C to the Petition.

STATEMENT

For some years, the American Telephone and Telegraph Company and its associated Bell System companies (Bell) had on file with the Federal Communications Commission (Commission) tariffs for a service known as "private line" service. Under these tariffs, a customer could lease facilities enabling him to communicate between specified points whenever, and as much, as he pleased without going through the usual call-and-hook-up process (Pet. App. 6a). Private line service includes all sorts of bulk communications services, such as telephone, telegraph, telephoto, data transmission, signalling, etc. (Pet. App. 6a-7a).

Allegedly, to meet anticipated competition from private microwave systems, the eligibility for which was broadened in *Allocation of Microwave Frequencies Above 890 Mc,* 27 F.C.C. 359 (1959), 29 F.C.C. 825 (1960), Bell, on January 16, 1961, filed its so-called TELPAK tariff. This tariff contained four subdivisions, TELPAK A, B, C, and D, corresponding to the number of private line channels available to a customer (J.A. 1187-1190); TELPAK A was the equivalent of 12 voice channels, TELPAK B, 24, TELPAK C, 60, and TELPAK D, 240 (J.A. 1188).[2] As pointed out by the court below (Pet. App. 8a), the disparity between TELPAK and private line rates is "startling." Thus, the monthly charge for TELPAK A is $1,860 compared with the charge for 12 channels under the private line tariffs of $3,780. For TELPAK B, the

[2] The TELPAK rate structure included two basic charges, one for base capacity on a per airline mile per month basis, and the other for channel terminals which varied with the type of terminal equipment utilized (*e.g.*, telephone, teletypewriter, data terminal equipment) (J.A. 1188).

charge is $2,720 compared with the charge for 24 private line channels of $7,560 (Pet. App. 8a) The tariff described the services offered as:

> "* * * communications paths of various widths (TELPAK Channels) which are capable of transmitting various forms of electrical communication required by a modern business, such as telephone, teletypewriter, control, signalling, facsimile and data. The Telephone Company will provide channelizing equipment to subdivide TELPAK channels into channels of lesser width (derived channels) or will terminate the entire TELPAK channel for use as a broadband transmission medium" (J.A. 1188).

In March, 1961, The Western Union Telegraph Company (Western Union), Bell's only common carrier competitor in the private line field, protested that Bell was applying the TELPAK tariff to service furnished over diverse private line channels rather than limiting its application to service provided over discrete broadband channels as specified in the tariff (J.A. 1198-1212).[3] The Commission, on April 12, 1961 and again on June 30, 1961, ordered Bell to comply with the terms of its tariff and to apply TELPAK rates only when customers were furnished with a single broadband channel from which channels of a lesser bandwidth were derived (J.A. 1225-31, 1247-54). Thereafter, on August 3, 1961, Bell amended the TELPAK tariff to permit the furnishing of TELPAK service over diverse facilities (J.A. 1255-56).

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[3] Diverse channels are those furnished over such physical facilities or routes as the telephone company chooses or has available at the time, and includes the use of channels not derived from a single broadband channel. Discrete channels are those provided in a single broadband on the same physical facilities.

Following further objections by Western Union (J.A. 1256-76) as well as by Motorola, Inc., a private microwave equipment manufacturer (J.A. 1276-93), the Commission, on September 8, 1961, issued an order instituting an investigation into the lawfulness of the TELPAK tariff as thus amended (J.A. 6-10).[4] The order provided, *inter alia,* that:

> "* * * the examiner to be designated to preside at the hearing shall certify the record to the Commission for decision without preparing either an Initial or Recommended Decision;" (J.A. 10).

Invoking the Administrative Procedure Act, Bell and Intervenor, Aeronautical Radio, Inc., requested that the order be modified to require the Examiner to issue an initial decision; further, they moved that the Commission's Common Carrier Bureau not be permitted to participate in the decisional stages of the proceeding (J.A. 11-18). The Commission, however, denied those requests (J.A. 51-56), pointing out that the separation of functions provision of the Administrative Procedure Act was specifically inapplicable to proceedings, such as the instant proceeding, involving the validity of rates charged by a carrier, and further that the movants would have an opportunity to file proposed findings as well as exceptions to the Initial Decision and to request oral argument before the Commission (J.A. 53).

Extensive hearings were held over the period from October 31, 1961, to September 17, 1962. Thereafter,

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[4] The Commission simultaneously suspended the effectiveness of the amendment for the 3 months permitted by Section 204 of the Communications Act (47 U.S.C. 204). However, with the expiration of the suspension period on December 8, 1961, the tariff amendment went into effect and TELPAK has been available over diverse facilities since that time.

on March 20, 1964, the Commission issued its Tentative Decision (J.A. 681-721), in which it found, on the basis of a detailed analysis of the evidence, that (J.A. 718-9):

> "(a) Services furnished under the TELPAK tariff and those furnished under the various other private line tariffs are like communications services.
>
> "(b) There are no material cost differences attributable to furnishing a number of channels to one customer under TELPAK as opposed to furnishing the same number of channels to several customers under the other private line tariffs.
>
> "(c) There is no justification for TELPAK A and TELPAK B in terms of competitive necessity, inasmuch as the rates for the equivalent number of channels offered under ordinary private line tariffs are reasonably competitive with the costs of private microwave systems. * * *".

Accordingly, the Commission proposed to direct Bell to file "appropriate rate schedules * * * designed to eliminate the unlawful discriminations herein found" (J.A. 719).[5]

Exceptions were subsequently filed against the Tentative Decision. Oral argument was held before the Commission *en banc,* and, on December 24, 1964, the Commission issued a Memorandum Opinion and Order substantially adopting the Tentative Decision (J.A. 1116-31). Petitions for reconsideration of this order

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[5] With regard to TELPAKs C and D, the Commission found that there was apparent justification in terms of meeting competition from private microwave systems with comparable channel capacities. However, the Commission was unable to determine on the existing record whether the rates therefor were compensatory in relation to the costs of furnishing the services (J.A. 718).

were denied by the Commission's Memorandum Opinion and Order released May 4, 1965 (J.A. 1173-87).

Eight petitions for review of the Commission orders relative to TELPAKs A and B[6] were filed in the court below by 17 TELPAK users, led by 26 Bell Companies and including the United States acting through the Administrator of General Services.[7] The court below affirmed the Commission's finding of unlawful discrimination in a detailed opinion, in which it concluded (Pet. App. 25a):

> "* * * It is the well-established proposition that the findings of an administrative agency within the boundaries of its statutory power, if supported by substantial evidence on the record as a whole, are not to be disturbed by a court. But at the same time we cannot neglect that other well-established rule that the conclusions of the agencies are subject to judicial review, and for that purpose the reviewing authorities must know the bases upon which the conclusions rest. So we have explored the premises for the Commission's findings and conclusions in the case at bar. We find no reason to disturb them.
>
> "We commend the full text of the three opinions under review in this proceeding to the attention of any other reviewing authority and of any student researching in this area."

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[6] No issue was raised as to TELPAKs C and D.

[7] Western Union was permitted to intervene in the court below in support of the Commission's orders.

ARGUMENT

Petitioners, who are far fewer in number than in the court below,[8] do not here dispute that TELPAK and private line services are "like" services and that there is no material cost differences or competitive necessity to justify lower rates for TELPAKs A and B than for private line service. Instead, Petitioners urge the presence of substantial legal questions. However, it has long been recognized that questions of unlawful discrimination present primarily questions of fact. See, *e.g., Texas & Pacific Ry. Co.* v. *I.C.C.*, 162 U.S. 197, 238 (1896); *Board of Trade of Kansas City, Mo.* v. *United States*, 314 U.S. 534, 546 (1942) and cases there cited. Moreover, not only has the court below obviously subjected the Commission's findings and conclusions to unusually careful and thorough scrutiny, but its affirmance thereof plainly was based upon a strong conviction that none of Petitioners' claims had any merit either factually or legally.[9]

As shown below, this conviction is eminently correct and there is no basis for holding that the Commission's "finding is unsupported or without rational basis or rests on an erroneous construction of the statute." *L. T. Barringer & Co.* v. *United States*, 319 U.S. 1, 6-7 (1943) and cases there cited; *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 348-9 (1940). The decision below accords with established precedents and presents no novel question or conflict of decision. In

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[8] Significantly, neither Bell nor the Administrator of General Services has petitioned for certiorari.

[9] Such conviction is, we submit, manifest from the refusal of the court below to continue in effect, pending certiorari, the stay which it had granted in the early stages of the proceeding before it.

addition, this Court only recently denied certiorari with regard to the same procedural question which Petitioners seek to raise. See *Wilson & Co., Inc., et al.*, v. *United States,* 335 F. 2d 788, 796 (7th Cir. 1964), certiorari denied on this point No. 765, Oct. T. 1964, 380 U.S. 951 (1965). Accordingly, we submit, there is no warrant for further review by this Court.

I

The Affirmance by the Court Below of the Commission's Orders Is Based on a Proper Construction of the Communications Act

(a) In seeking to cast doubt upon the affirmance by the court below of the Commission's ruling that TELPAKs A and B are unlawfully discriminatory in violation of Section 202(a) of the Communications Act, Petitioners argue (Pet. pp. 10-11) that that court has construed Section 202(a) too narrowly.[10] Thus, they imply (Pet. p. 11) that the Court of Appeals failed to appreciate that Section 202(a) prohibited "only that discrimination which is unreasonable, undue or unjust." But the court plainly made no such error. As is apparent from the excerpt which Petitioners themselves quote in this connection from the court's

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[10] Petitioners' claim, that this case presents the first judicial review of Section 202(a) and its applicability to competitive rate making, is at odds with Petitioners' own recognition that Section 202(a) * * * was purposefully drawn by Congress to conform to the comparable provision of Section 2 of the Interstate Commerce Act. * * * " (Pet. p. 13). The latter Section has acquired an extensive gloss on which Petitioners themselves seek to draw to buttress their position. Likewise, Petitioners' reference (Pet. p. 10) to the Bell brief for support of its claim of importance is out of keeping with the fact that Bell is not here seeking certiorari whereas it led the attack upon the Commission's orders in the court below.

opinion (Pet. pp. 10-11), the court below was fully aware that Section 202(a) makes it unlawful:

> "* * * for 'any' carrier to make 'any' *unjust* discrimination by 'any' means or to make 'any' *undue* preference to 'any' particular person or to subject 'any' person to 'any' *undue* prejudice." Emphasis supplied).

Further, Petitioners urge (Pet. p .11) that the ruling below overlooks the classification provisions of Section 201(b), in particular, the "commercial" classification, which, according to Petitioners (Pet. p. 11), is a "classification by volume use," applicable to "TELPAK [as] in effect a 'large commercial' classification." But apart from the fact that no such argument was made or question raised in the court below,[11] Petitioners' arguments as to the scope of the "commercial" classification is based solely upon their own *ipse dixit.* Moreover, it should be noted that the TELPAK A and B rates have been held to be unjustly discriminatory *vis-a-vis* private line rates and the latter type of service similarly would also come within the "commercial" classification. Consequently, since Petitioners do not question the Commission's findings (J.A. 718), affirmed by the Court below (Pet. App. 15a-16a), that TELPAK and private line services are "like" services with only the rates charged being different, the classification provisions of Section 201(a) do not help Petitioners' position.

Had a separate "classification" been contrived for TELPAKs A and B, such "classification" would, we

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[11] Contrary to Petitioners' claim (Pet. pp. 12-13), the issue designated by the Commission with regard to Section 201(b) related solely to the reasonableness of the TELPAK rates, and did not involve the classification provisions of that Section. (See J.A. 9; see also J.A. 685).

submit, in the light of the record herein, clearly have been unreasonable, and would have run afoul of the "just and reasonable" requirement of Section 201(b) and the proscription against unlawful discriminations contained in Section 202(a). Indeed, despite the fact that Section 201(b) permits a separate classification for "Government", the Commission has held that since there is no cost justification for lower rates to the Government, it must pay the same rates as other users. *In the Matter of Charges for United States Government Domestic Telegraph Communications,* 12 F.C.C. 374, 383-6 (1947).

(b) Petitioners also suggest (Pet. p. 12) that the Commission's finding of unlawful discrimination ignores the acceptance generally of volume discounts and is unjustified by the Communications Act. However, whereas in other industries volume sales typically result in cost savings to the seller, the Commission found (J.A. 718)—and the Petitioners do not question—that Bell's cost in providing, for example, 12 TELPAK voice channels is at least[12] twelve times the cost of providing one voice channel to 12 separate private line customers. This is self-evident inasmuch as private line and TELPAK are identical services. And when TELPAK was initially offered, the larger private line customers were merely billed under the reduced TELPAK rates, without any change whatsoever in the facilities furnished to them (Pet. App. 12a).

Moreover, Petitioners' implication that volume discounts are permissible in commerce generally without

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[12] It may well be that TELPAK involves greater administrative costs, in some situations, than does private line service so that *pro rata* costs per voice channel might well be greater with TELPAK than with private line service (See J.A. 695-8).

any cost or competitive justification is belied not only by the express provisions of the Robinson-Patman Act, 15 U.S.C. 13(c), but by this Court's decisions, including *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743 (1947) relied on by Petitioners (Pet. p. 12). Indeed, while the Court in that case held that volume discounts do not *per se* violate the Robinson-Patman Act, it carefully pointed out (at p. 746) that volume discounts were illegal under certain conditions.

Likewise, it is significant, contrary to Petitioners' assertion (Pet. p. 12), that the ruling here does not condemn all volume discounts as discriminatory. The Commission expressly admonished that its decision should not "be construed as foreclosing carriers from establishing schedules of charges which will promote the use of volume communication" (J.A. 718-9, 1122). It disapproved the TELPAK A and B discounts because it found that these discounted rates were not justified by either cost differentials or competitive necessity (J.A. 718-9).

Further, the Commission's reading of Section 202 (a) accords not only with its own prior construction of that Section,[13] but also with this Court's construction of Section 2 of the Interstate Commerce Act from which Section 202(a) is derived. See, e.g. *Eastern-Central Motor Carriers Ass'n* v. *United States*, 321 U.S. 194 (1944); *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 352 (1940). In *Eastern-Central* this Court noted the I.C.C.'s former policy—when it had regulated only railroad rates—under which it initially had rejected all wholesale, i.e. volume dis-

[13] See e.g. *A.T.&T. and Western Union Private Line Cases*, 34 F.C.C. 217, 317 (1963), aff'd *sub nom., Wilson & Co.* v. *United States*, 335 F. 2d 788 (7th Cir. 1964) and cases there cited.

count, rates and ultimately had permitted differences in rates only when justified by differences in costs, all with judicial approval (321 U.S. at 205). Subsequently, when the I.C.C. was given rate responsibility over competing modes of transportation, this Court held that the Commission could take competitive considerations, as well as costs, into account in fixing rates, but that neither factor is necessarily controlling; "* * * the choice would be for the Commission to make upon a proper weighing of the facts and opposing policies possibly applicable" (*Id.* at 210). Such weighing, as the court below pointed out (Pet. App. 18a-19a), is what the Commission did here.

(c) This Court's opinion in *Eastern-Central* is one answer to Petitioners' further and unsupported assertion (Pet. pp. 13-14) that the holding below conflicts with decisions of this Court. Another answer is Petitioners' own failure to pinpoint the decisions of this Court involved in the alleged conflict.[14] In urging a conflict, Petitioners refer to two decisions of this Court. But no conflict exists with regard to either. In *I.C.C.* v. *Baltimore & Ohio R. Co.*, 145 U.S. 263 (1892) (Pet. p. 14), this Court found the lower group transportation rate there involved to be justified by cost savings (145 U.S. at 281-2):

> "* * * To bring the present case within the words of this Section [Section 2], we must assume that the transportation of ten persons on a single ticket is substantially identical wth the transportation of one, and, *in view of the universally accepted fact that a man may buy, contract, or manufacture*

[14] Indeed, Petitioners' discussion in this connection is concerned primarily with agency decisions, which in fact are wholly consistent with the result here.

on a large scale cheaper proportionately than upon a small scale, this is impossible." (Emphasis supplied)[15]

And in *I.C.C.* v. *Delaware L. & W. R. R.*, 220 U.S. 235 (1911) (Pet. p. 14), this Court set aside an attempt by the railroads to deny freight forwarders the benefits of carload rates solely because they did not own the property which they offered for shipment.

(d) As to Petitioners' further contention that TELPAK A and B rates are discriminatory only in theory and do not result in any actual injury (Pet. pp. 15-17), it should be noted that the unlawful discrimination inherent in TELPAKs A and B results in economic injury in at least three ways. First, it places at an economic disadvantage, vis a vis their larger competitors, those companies whose bulk communications needs are not large enough, either alone or in conjunction with other users, to obtain the benefit of at least a TELPAK A.[16] The magnitude of this injury is highlighted by the fact that the rates for TELPAK A are at least 51% lower than the rates for comparable private line service (J.A. 694; Pet. App. 8a). Second, it is demonstrable (J.A. 710) that the revenues received from serving new bulk communications customers as a result of TELPAKs A and B do not offset the loss in revenues resulting from the switch by old customers to TELPAKs A and B. This net revenue loss re-

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[15] See, also III-B SHARFMAN, INTERSTATE COMMERCE COMMISSION, p. 375.

[16] For example, United Press International, an intervenor before the Commission, specifically complained of "the advantage accruing to its competitor, Associated Press, whose pattern of private line service enabled it to take advantage of TELPAK rates while that of UPI did not" (J.A. 719).

dounds to the detriment of the small non-TELPAK customers. And third, as found by the Commission (J.A. 717-8) the discriminatory low TELPAK rates diverted business to Bell and resulted in substantial revenue losses to Western Union.

Similarly out of place here is Petitioners' related argument (Pet. pp. 15-16), that the striking down of TELPAKs A and B results in "real discrimination" because "common carrier customers with inadequate requirements for TELPAK C and D rates now would be deprived of any real opportunity to benefit from TELPAK A and B rates unlike the larger users." In so urging, Petitioners basically are complaining (inadvertently no doubt) with regard to the Commission's failure, at this time, also to condemn TELPAKs C and D as unlawfully discriminatory.[17] Moreover, this argument ignores the fact that for the past 6 years the users of TELPAKs A and B have been the beneficiaries of low rates to the detriment, to paraphrase Petitioners, of those "common carrier customers with inadequate requirements for TELPAK" A and B.

Nor is the effect of the Commission's order here improperly to bestow a benefit upon Bell and Western Union, as Petitioners also contend (Pet. p. 16). As regulated common carriers, both Bell and Western Union are limited to earning a reasonable return. Indeed, Bell is now involved in an overall interstate rate investigation (Docket No. 16258) recently instituted by the Commission. Consequently, to the extent that the Commission's orders here result in Bell's raising

[17] As pointed out above, no issue was raised in the petitions for review herein as to the Commission's finding that TELPAKs C and D may be justified by competitive necessity (J.A. 718).

its TELPAK A and B rates,[18] they operate to remove the subsidy heretofore accorded the users of TELPAKs A and B and open the way for rate reductions for other regulated services provided by Bell. Thus, the beneficiaries ultimately of the removal of the unlawfully discriminatory TELPAK A and B rates are other Bell customers, not Bell itself.

(e) Finally, improperly characterizing TELPAK rates as "developmental" (e.g., Pet. pp. 17, 18) and claiming that TELPAK has stimulated a "broad surge in use of communications services and facilities" (Pet. p. 17), Petitioners contend that the Commission's holding herein would have a "stultifying effect" and lay "a deadening hand upon technological innovation" (Pet. p. 19), and hence fails to give effect to a "higher, overriding consideration * * * which must ultimately govern—the public interest standard * * *" (Pet. p. 17).

But, as pointed out earlier, TELPAK and private line service are "like" services with TELPAK being only a pricing device wholly indistinguishable from the available services under private line tariffs. Consequently, the alleged stimulus, if any, afforded by TELPAK consists solely of its unlawfully discriminatory volume discount for which the tab is picked up by the small user, who is limited to non-discounted private line service. Moreover, as pointed out by the court below (Pet. App. 24a), "The Commission has not for-

[18] The results of a cost study presented by Bell in September, 1965, in the *Domestic Telegraph Service Investigation*, F.C.C. Docket No. 14650 showed an indicated rate of return of only .3 of 1% for TELPAK. Similarly, a Bell vice-president recently testified in the aforementioned rate investigation that the TELPAK rates are not reasonable and "need to be revised * * * up." (F.C.C. Docket No. 16258, Tr. 4254).

bidden TELPAK. At the most, it has told the Company to make its rates for the new service non-discriminatory with its existing services. * * * We do not find the horrendous effects pictured by Petitioners."

In any case, this Court has left no doubt that the elimination of unlawful discrimination is itself one of the prime public interest objectives of regulation. For example, as early as 1906, this Court declared:

> "It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all, and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. * * *" *New York, N.H. & H.R. Co.* v. *I.C.C.*, 200 U.S. 361, 391 (1906).[19]

II

The Commission's Procedures Do Not Operate to Deny Constitutional Due Process

(a) This Court has only recently denied certiorari with respect to the same procedural question as Petitioners seek to raise here. *Wilson & Co.* v. *United States,* 335 F. 2d 788 (7th Cir. 1964), certiorari denied on this point, No. 765 Oct. T. 1964, 380 U.S. 951 (1965). In *Wilson,* which likewise involved an F.C.C. rate proceeding, the Commission, as here, directed the Examiner not to prepare a decision, and instead itself issued

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[19] To the same effect, see, e.g., *Kansas City Southern Railway* v. *Albers Commission Co.*, 223 U.S. 573, 597 (1912); *The Shreveport Case,* 234 U.S. 342, 356 (1914); *Louisville & Nashville R. Co.* v. *United States,* 282 U.S. 740, 749, 750 (1931); *Merchants Warehouse Co.* v. *United States,* 283 U.S. 501, 512, 513 (1931); *State of New York* v. *United States,* 331 U.S. 284, 296 (1947).

a Tentative Decision, received exceptions, heard oral argument, and then issued a final decision, all with the participation of its Common Carrier Bureau.[20] In rejecting the Petitioners' complaints, the Seventh Circuit there held (335 F. 2d 788, 796):

> "* * * that it was proper for members of the Commission's Common Carrier Bureau who were counsel of record in the hearing before the Commission to participate in the decisional process that led to the orders under review; and that this conduct did not violate section 3(a) of the Administrative Procedure Act, 5 U.S.C. 1002(a), sections 409(c) and 205(a) of the Communications Act of 1934, 47 U.S.C. §§ 409(c), 205(a), the Commission's own rules, as well as constitutional due process."[21]

Significantly, not only did this Court refuse to review this holding of the Seventh Circuit, but the Court simultaneously granted certiorari with respect to other rulings of the Seventh Circuit in the same proceeding. See, *United States* v. *Wilson & Co.*, No. 909, Oct. T. 1964, certiorari granted, 380 U.S. 950 (1965).

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[20] Although *Wilson*, as here involved rates of Bell, Bell took the position in *Wilson* that "* * * the procedure followed by the Commission in this case does not run counter to existing statutes and that any change must be fashioned by Congress, or by the administrative agencies through rules of procedure." Bell Brief in *Wilson & Co.* v. *United States, supra*, pp. 25-26.

[21] As noted by the Commission in *American Telephone & Telegraph Co.*, 2 F.C.C. 2d 142 (1965), 2 F.C.C. 2d 877 (1966), another rate making proceeding where the same question has been raised (at 144):

> "The separation of functions procedures which we follow here are not novel. They are long established, having been consistently employed by the Commission since the inception of its ratemaking functions. They have been used in several recent important Commission ratemaking proceedings."

(b) Contrary to Petitioners' allegation (Pet. pp. 22-23) that "the Commission's procedures conflict * * * with the clear holding of *Morgan* v. *United States,* 304 U.S. 1 (1938)," the Commission's procedures here are fully in accord with the *Morgan* group of cases. In the *Morgan* case cited by Petitioners, this Court reversed a rate order of the Secretary of Agriculture because the interested parties were not given "a reasonable opportunity to know the claims of the opposing party [the Secretary] and to meet them" (304 U.S. at 18). As noted by the Court, the Secretary had never clarified his position during the hearing (304 U.S. at 19), and the first notice the parties received of his "concrete claims" was after the Secretary had finally "accept[ed] and ma[de] as his own the findings which ha[d] been prepared by the active prosecutors for the Government, after, an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them" (*Id.* at p. 22).

Thus, the thrust of *Morgan* is not that preparation of a decision by counsel who had participated in the hearings was *per se* improper. To the contrary, following the remand, the Secretary reissued his original final decision as an initial or tentative decision, and gave the parties an opportunity to file exceptions and to present oral argument thereon before issuing his final decision, a procedure which parallels closely that followed by the Commission here and under which the parties were given a full opportunity to know and meet the Commission's claim before issuance of a final decision. Since this procedure was approved by this Court in *United States* v. *Morgan,* 307 U.S. 183, 187 (1939) and again in *United States* v. *Morgan,* 313 U.S.

409, 415-6 (1941), the procedure here followed by the Commission plainly is without constitutional infirmities.

In this regard, there should be noted the inaccuracy of Petitioners' claim (Pet. p. 24), that the Common Carrier Bureau counsel are "advocates in the case." As pointed out by the Commission in dealing with this point in *American Telephone & Telegraph Co., supra,* at 146:

> "* * * The Commission * * * expects its Common Carrier Bureau to provide such expert assistance, as it may require, both in the many ratemaking problems handled informally and in those matters which the Commission determines to require resolution in a formal investigation. In the latter event the function of the Common Carrier Bureau is *not* to be an advocate of a preconceived position or to take a conventional adversary position. Rather it is to insure the development of a full and complete record which presents the facts and other ratemaking considerations relevant to a fair and meaningful legislative determination by the Commission of the complex issues involved.[22] (Emphasis in original)

(c) Petitioners' claims (Pet. pp. 25-26) with regard to the Commission's order dispensing with the hearing

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[22] Also it should be noted that the Commission's *Rules Governing Ex Parte Communications,* 1 F.C.C. 2d 49 (1965), not only bars *ex parte* communications between interested persons and decision-making Commission personnel during the pending of all proceedings which have been designated for hearing, but includes the Commission's Common Carrier Bureau as decision making Commission personnel. As stated by the Commission in *American Telephone & Telegraph Co., supra,* at 879-880, these rules merely recognized and codified the pre-existing practice.

examiner's decision ignores the fact that Section 8(a) of the Administrative Procedure Act expressly contemplates the tentative decision procedure here followed by the Commission. Section 8(a) provides that the hearing examiner's decision may be omitted in situations, *inter alia*, where "in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision * * *." Indeed, in commenting thereon, the Attorney General has noted that this provision:

> "* * * permits, in proceedings to make rules and to determine applications for initial licenses, the continuation of the widespread agency practice of serving upon the parties, as a substitute for either an examiner's report or a tentative agency decision, a report prepared by the staff of specialists and technicians normally engaged in that portion of the agency's operation to which the proceeding in question relates * * *"[23]

(d) Similarly without any substance is Petitioner's further argument (Pet. pp. 26-27) that the justification of the Commission procedure here involved as legislative action is "out-dated." The dichotomy between adjudication and legislative, i.e. ruling making, action—which Petitioners would thus discard as obsolete—was expressely applied by the Ninth Circuit in its recent decision in *California Public Utilities Commission* v. *United States,* 356 F. 2d 236, 241, (1966) certiorari denied, 335 U.S. 816 (October 10, 1966) as well

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[23] S. Doc. No. 248, 79th Cong., 2d Sess., p. 229, see, also the Attorney General's Manual on the Administrative Procedure Act (1947) pp. 82-83.

as by this Court in *Hannah* v. *Larche*, 363 U.S. 420, (1960) cited by Petitioners (Pet. p. 26).[24]

In any case, it should be noted (1) that the Administrative Procedure Act is based on the basic dichotomy between adjudication and rulemaking with the latter explicitly including the making of future rates, such as is here involved and (2) that, as Petitioners point out (Pet. p. 27, fn. 20), the separation of functions provisions of Section 5(c) of that Act applies only to adjudication—not to rule making— and even within the area of adjudication, "proceedings involving the validity or application of rates * * * of public utilities or carrers," are expressly exempted from the separation requirements. In a word, the Administrative Procedure Act imposes no requirement with regard to separation of functions in ratemaking proceedings, whether such proceedings be regarded as rulemaking or adjudication.

(e) Whatever its abstract validity, Petitioners' further argument (Pet. p. 29) that "the proscriptions of the Administrative Procedure Act are not to be equated with due process" has no place here. As shown earlier herein, each step of the Commission's procedure here is expressly provided for by the Ad-

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[24] Immediately following the statement from *Hannah* quoted by Petitioners (Pet. p. 26), this Court went on to rule (360 U.S. at 442):

> "On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used * * *.
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> "It is probably sufficient merely to indicate that the rights claimed by respondents are normally associated only with adjudicatory proceedings and that since the Commission does not adjudicate it need not be bound by adjudicatory procedures."

ministrative Procedure Act. Petitioners significantly do not question the constitutionality of the various provisions of the Administrative Procedure Act sanctioning such procedure.

Moreover, contrary to Petitioners' implication (Pet. p. 28), the courts have recognized that generally compliance with the Administrative Procedure Act simultaneously satisfies due process. Apart from *Gonzales* v. *United States,* 348 U.S. 407 (1955) which did not involve the Administrative Procedure Act, the other cases cited by Petitioners (Pet. p. 28) involved for the most part, situations where the agency order in issue was set aside for failure to comply with the controlling provisions of the Administrative Procedure Act.

Sangamon Valley Television Corp. v. *United States,* 269 F. 2d 221 (D. C. Cir. 1959), on which Petitioners place special emphasis in this connection (Pet. pp. 28-29), is wholly inapposite. In that case which "involved not only allocation of TV channels among communities but also resolution of conflicting private claims to a valuable privilege * * *" (269 F. 2d at 224), the Court of Appeals set aside the Commission's license grants on the ground that extensive *ex parte* solicitations were made to members of the Commission by a party with heavy financial interest in the outcome of the proceeding (*Id.* at 223-224). Not only did that case not involve staff separation of functions, but here the staff of the Commission's Common Carrier Bureau plainly have not gone beyond their responsibilities in consulting with the Commission nor do they have any stake, financial or otherwise, in the outcome of this proceeding.

(f) Finally, despite Petitioners' contentions (Pet. pp. 30-32), there is nothing in the recent proceedings

before Congress or the Administrative Conference of the United States to support Petitioners' claim of denial of constitutional due process. To the contrary, as pointed out by the Commission in *American Telephone & Telegraph Co., supra,* at 145:

> "* * * In 1952, the Congress considered the separation of functions question and decision-making procedures in the specific context of Commission practice. * * * [At that] time, Congress considered and expressly rejected the concept that separation of function procedures must be utilized by the Commission in rate making proceedings. [fn. omitted]
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> "* * * In 1961, the Congress * * * considered the separation of functions question when it again amended the separation of function provisions contained in section 409 of the Communications Act [fn. omitted]. On this further reappraisal Congress did not extend the separation of function provisions to ratemaking." [25]

Moreover, while the Administrative Conference has made recommendations which, if followed by the Commission, might curtail the participation of its Common Carrier Bureau in the decisional process.[26] there is

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[25] Section 409(c)(2) of the Communications Act, 47 U.S.C. 409(c)(2), as thus amended, subjects licensing proceedings under that Act to the separation of functions provision of Section 5(c) of the Administrative Procedure Act by countermanding the exemption for licensing proceedings in Section 5(c).

[26] The Conference's Recommendation No. 19, stressed by Petitioners (Pet.. p. 31), is phrased in terms of "off-the-record communications between the *presiding examiner* and members of the agency's staff" (Emphasis supplied). In addition to the fact that the Recommendation does not apply to such communications between *agency members* and its staff, the Commission practice in rate cases, as mentioned earlier, is for the Commission itself to issue a Tentative Decision, rather than having the examiner issue a recommended decision.

nothing in the Conference reports indicating that failure of the Commission to follow these recommendations would, in the Conference's view, result in a denial of constitutional due process. Proof positive is the fact that Judge Prettyman who, in writing the opinion for the court below, gave short shrift to Petitioners' contentions in this regard, was also the Chairman of the Administrative Conference.[27]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[27] While, as Petitioners note (Pet. p. 32, fn. 25), Commissioner Loevinger, has expressed opposition to these Commission procedures, his opposition is based on policy, not on constitutional, or even statutory, grounds. See *American Telephone & Telegraph Co., supra,* at 880, 888.